

The Death of Treaty

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INTRODUCTION

Treaty, like Contract, is dead.¹ The treaty doctrine of *pacta sunt servanda*, like the doctrine of consideration, has had to make room for an unruly upstart, the doctrine of promissory estoppel.² In fact, Treaty must now cohabit with a doctrine of liability for gratuitous promises even in the absence of reliance—an indignity rarely suffered by Contract, either in this country or abroad.³ Treaties must also give way to a reborn United Nations Security Council, whose binding resolutions trump conflicting treaty obligations.⁴ And treaties are

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¹ Cf. GRANT GILMORE, *THE DEATH OF CONTRACT* 3 (1974) (providing an obituary for Contract).

² See *North Sea Continental Shelf Cases* (F.R.G. v. Den.), 1969 I.C.J. 3, 26 (Feb. 20) (asserting "estoppel" could preclude Germany from "denying the applicability of the controversial regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice"); Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 16-23 (1977) (describing the development of estoppel on the international plane).

³ Compare *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253, 267-70 (Dec. 20) (finding that France was legally bound by unilateral promises to halt certain nuclear testing, even absent a showing of reliance by other states) with E. ALLAN FARNSWORTH, *CONTRACTS* § 2.5 (2d ed. 1990) (noting that gratuitous promises are generally unenforceable in U.S. law) and Rubin, *supra* note 2, at 22 (finding "no support in any known private law system" for enforcement of gratuitous promises in the absence of reliance). But cf. *RESTATEMENT (SECOND) OF CONTRACTS* § 90(2) (1981) (providing that "[a] charitable subscription or marriage settlement is binding . . . without proof that the promise induced action or forbearance").

⁴ See U.N. CHARTER art. 103 (providing that Charter obligations "shall prevail" over inconsistent treaty obligations); cf. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), 1992 I.C.J. 114 (Provisional Measures Order of Apr. 14) (holding that a Security Council resolution superseded "whatever rights Libya may have enjoyed" under a pre-existing treaty on terrorism).

invalid if they violate unspecified "peremptory norms" of international law or if they can no longer be justified in light of changed circumstances.⁵ In United States law, treaties have been marginalized by the self-executing treaty doctrine⁶ and attacked by creative "reinterpretation."⁷

Some would argue that Treaty cannot be dead because it never had a life in the first place.⁸ On this view, international law is not "law" at all because it cannot be reliably enforced.⁹ A traditional response is to point out similar shortcomings in domestic law, and to stress that most rules of international law are in fact obeyed by most states most of the time, if only because they fear reciprocal sanctions.¹⁰ This response rarely convinces the die-hard positivist, who insists there must be an effective global police force before we can speak of international law. But even the most stubborn skeptic should concede that whether or not it is really law, international law *matters* because it affects the behavior of states. Even the skeptic may wonder whatever happened to treaties.¹¹

This Article explores the decline and fall of Treaty. Part I of the Article traces the origins and development of treaties. It argues that Treaty reached its political and doctrinal zenith in the nineteenth century, the "classical" era of international law, when diplomacy revolved around shifting bilateral treaty

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 62, 64, 1155 U.N.T.S. 331, 344-47.

⁶ See, e.g., *Sei Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (holding that the human rights provisions of the U.N. Charter are not self-executing and therefore may not be invoked by private litigants); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (criticizing the doctrine).

⁷ Compare Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986) with Abram Chayes & Antonia Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986) and David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353 (1989).

⁸ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133 (Humanities Press ed. 1965) ("Laws properly so called are a species of *commands*."); *id.* at 201 ("the law obtaining between nations is not positive law . . ."); F.A. HAYEK, *THE ROAD TO SERFDOM* 233 (1944) ("We must not deceive ourselves . . . in calling the rules of international behavior international law . . ."); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 8 n.10 (1990).

⁹ See Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 208-15 (1968) (describing the "nonlaw" frame).

¹⁰ See LOUIS HENKIN, *HOW NATIONS BEHAVE* 13-27 (2d ed. 1979).

¹¹ Cf. GILMORE, *supra* note 1, at 4 ("Whatever happened to the doctrine of consideration?").

relations, and a state's promise was binding only if made in the context of a formal international agreement. Treaties were the centerpiece of a "contract" model of international relations. Part II explores the subsequent doctrinal disintegration of Treaty. It asserts that the traditional "contract" model of treaty doctrine has been challenged by a new "tort" model, one that holds states responsible for their unilateral promises in the absence of mutual agreement or even reliance by the promisee. I praise this development as an efficient means of "channeling" diplomacy into a new form—the binding unilateral promise. Part II also explores other doctrinal challenges to the traditional regime of *pacta sunt servanda*.

Part III asserts that the decline of Treaty as an institution has been even more dramatic than its doctrinal disintegration. This part argues that the "contract" model of international relations, one that relied on interlocking bilateral treaties between individual sovereigns, is being replaced by a "legislative" model, one that relies more heavily on the "direct democracy" of multilateral conventions and especially the "representative democracy" of the United Nations Security Council. I applaud the legislative model as an efficient means of codifying, unifying, and advancing the law, but I argue for a continuing role for treaties, both bilateral and multilateral, to ensure that international law develops democratically and thus maintains its legitimacy. In addition, Part III asserts that the "legislatification" of international law extends to United States domestic law, which denies effect to most treaties unless Congress enacts implementing legislation. I argue that our preoccupation with implementing legislation has unduly diminished the importance of treaties in our domestic legal system. Finally, Part III contends that the "congressification" of United States foreign policy, together with a long-standing American missionary zeal,¹² has contributed to an "Americanization" of international law that threatens to overwhelm Treaty. Increasingly, American statutory law, not international agreement, regulates conduct outside the United States. I argue that there is indeed a need for some American extraterritoriality but that Congress and the executive should place greater emphasis on international cooperation in the development of international law. Part IV concludes with speculations on the possibility that Treaty will be reborn.

¹² Cf. A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS AND NATIONAL JURISDICTION 208 (1988) (commenting on the "sense of imperial mission" in American law).

I. ORIGINS AND DEVELOPMENT

"[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."¹³ So too in international law. Over the past two millenia, international law has moved from static rules based on natural law to dynamic rules based on positive law. From Roman times to the writings of the Spanish scholastics and the Dutch jurist Grotius, the jurisprudence of international law was dominated by the notion that fixed natural laws, divine or otherwise, dictated relations among states. Diplomatic immunity, for example, was an inevitable consequence of the natural order of things. By the nineteenth century, international lawyers focused instead on what states actually did, and on the rules to which they supposedly "consented."¹⁴ Diplomatic immunity now stemmed from the practice of states. A "contract" model of international law had emerged. By the late twentieth century, diplomatic relations and most important questions of international law had been defined by treaties.

This is not to suggest that treaties are a new invention. They have existed in one form or another since the earliest human organizations were required to deal with each other to divide resources or simply to avoid war.¹⁵ In the fourth millennium B.C., city-states in Mesopotamia concluded a boundary agreement, preserved on a stone monument (a "stele"), that may have even provided for arbitration.¹⁶ Around 1272 B.C. the Egyptians and the Hittites concluded a peace treaty that appears to have been honored by the parties.¹⁷ The ancient Greeks developed more complex treaties that sometimes covered trade and even humanitarian law, as well as an impressive array of dispute resolution

¹³ HENRY MAINE, *ANCIENT LAW* 165 (Univ. of Ariz. Press 1986) (1864). And perhaps back to Status, as property rights have become increasingly defined by statutory entitlement and decreasingly defined by Contract. See Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 949 (1971).

¹⁴ LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* xxv-xxvii (3d ed. 1986) (describing the move to positivism).

¹⁵ See generally ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 1-16 (rev. ed. 1954) (describing treaty-making in antiquity).

¹⁶ See *id.* at 1-2.

¹⁷ See ADDA B. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* 31 (1960) (citing GEORGE CHKLAVER, *RECUEIL DE TEXTES DE DROIT INTERNATIONAL PUBLIC* 1 (1928) (containing the text of the treaty)). There is some doubt about the exact date. See NUSSBAUM, *supra* note 15, at 2 (suggesting 1279 B.C.); BOZEMAN, *supra* (suggesting the treaty was concluded 50 years earlier); see also GEORG SCHWARZENBARGER, *1 A MANUAL OF INTERNATIONAL LAW* 3 (4th ed. 1960) (describing peace treaties in the fourteenth century B.C.).

mechanisms.¹⁸ Early Chinese governments did as well. Indeed, Confucius's proposed Grand Union of Chinese States appears to have been one of the first experiments with collective security.¹⁹ The Roman Empire, too, entered into commercial agreements with its neighbors.²⁰ In general, however, treaties played a less important role in the international relations of the ancient world than in the modern world. International relations themselves were of less importance in ancient times, when communication and travel were infinitely more difficult than today. Ancient treaties did not give rise to detailed treatises on "treaty law."²¹

Through the Middle Ages, treaties slowly grew in importance, but not enough to generate a codified "law of treaties." In the Holy Roman Empire, international law was in theory unnecessary, since a single sovereign enforced imperial and ecclesiastical law throughout the Empire.²² Even feudalism discouraged the rise of international law, since feudal bonds sometimes governed transnational relations between leaders in different countries.²³ Moreover, the Empire did not make many international agreements with states outside the Empire.²⁴ In Asia Minor and the Balkans, the Byzantine Empire also consolidated large areas under one rule.²⁵ An increasingly unified China did treat with its Asian neighbors, but treaty relations with other states were

¹⁸ See BOZEMAN, *supra* note 17, at 79-85; II COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 127-48 (1911) (describing arbitration in antiquity); HENRY WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA* 1-18 (reprint 1973) (1845) (describing Greek practice). Inter-Greek treaties were apparently more common than treaties between the Greeks and "barbarians" (non-Greeks). See NUSSBAUM, *supra* note 15, at 5-6.

¹⁹ See Te-hsu Ch'eng, *International Law in Ancient China (1122-249 B.C.)*, 11 CHINESE SOC. & POL. SCI. REV. 38, 251, 256-57 (1927).

²⁰ See PHILLIPSON, *supra* note 18, at 74-89 (describing Roman treaty practice), 154-58 (describing examples of Roman practice in international arbitration); NUSSBAUM, *supra* note 15, at 11-12.

²¹ Not surprisingly, comprehensive commentaries on international law did not appear until the rise of positivism in the seventeenth and eighteenth centuries, when scholars became more interested in actual state practice rather than theoretical natural law. For an exhaustive collection of older secondary materials on all aspects of international law, see DR. J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, 400-34 (1968).

²² See HENKIN ET AL., *supra* note 14, at xxi ("[A]mong the nations of Europe, as long as the concept of [the Empire's] universal authority was ascendant, there was little need to develop rules concerning diplomatic intercourse between sovereign state[s] . . ."); NUSSBAUM, *supra* note 15, at 17-23. In practice, imperial princes and municipalities did treat with each other and, as the Empire eroded, with outside states. *Id.* at 23.

²³ NUSSBAUM, *supra* note 15, at 22-23.

²⁴ *Id.* at 23.

²⁵ See generally BOZEMAN, *supra* note 17, at 298-356.

sporadic at most.²⁶ Still, the growth of commerce in and among city-states like those in Italy and Northern Europe inevitably led to a growth in commercial and maritime treaties.²⁷ This trend accelerated during the Renaissance.

In 1624, the Dutch jurist Hugo Grotius published his landmark work *De Jure Belli ac Pacis*,²⁸ a treatise on the law of nations as well as private-law subjects like property and contract. Grotius stressed the primacy of natural law, but unlike the Spanish naturalists Vitoria and Suarez, who held that natural law was purely divine in origin, Grotius believed that much of natural law had a scientific basis and could be discerned through reason rather than faith.²⁹ On the whole, his vision of natural law seems to have favored stable, long-term treaty relations—"relational treaties," if you will.³⁰ Thus, he embraced the doctrine of *pacta sunt servanda*³¹ (i.e., treaties must be obeyed) and he maintained that treaties bind states after the death of the dignitary who signed the treaty and even after change of governments.³² He rejected the notion that a treaty (or a contract) could not be binding until partly performed.³³ He also seems to have advocated a predictable, objective approach to interpretation; in his view, natural law required that a state be bound by a "fair interpretation"

²⁶ See SIR GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 85 (1928); NUSSBAUM, *supra* note 15, at 65.

²⁷ NUSSBAUM, *supra* note 15, at 23-25.

²⁸ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (A.C. Campbell trans., Hyperion Press 1979) (1625).

²⁹ Cf. *id.* at 22 ("Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. . . . Thus two plus two must make four . . .").

³⁰ The term, of course, is Professor Macneil's. See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

³¹ See GROTIUS, *supra* note 28, at 174, 396.

³² *Id.* at 184-86. This analysis has greatly influenced subsequent thinking on state succession. See generally Maria Frankowska, Book Review, 79 AM. J. INT'L L. 235 (1985) (reviewing RENATA SZAFARZ, *SUCCESSION OF STATES IN RESPECT OF TREATIES IN CONTEMPORARY INTERNATIONAL LAW*).

It is less clear whether Grotius believed that states could wriggle out of their treaty obligations because of changed circumstances. See NUSSBAUM, *supra* note 15, at 112 (arguing that Grotius rejected this doctrine except where the circumstances in question were the sole basis for the treaty). According to Nussbaum, Grotius was less enamored of the doctrine of changed circumstances—the *clausula rebus sic stantibus*—than Gentilis, who "introduced it into international law." *Id.* at 96.

³³ GROTIUS, *supra* note 28, at 132 (criticizing the assertion that agreements have "no intrinsic force of obligation"). As to enforcement of executory contracts in early Anglo-American law, see sources cited *infra* note 104.

from "the most probable signs" of its treaty commitments.³⁴ Grotius also had a broad view of capacity, holding that it was lawful to enter into treaties with heathen.³⁵ Grotius's work, which was translated into many languages and disseminated around the world, had enormous influence in his day.³⁶

The Peace of Westphalia of 1648, which formally ended the Thirty Years War, has often been called the beginning of modern international law.³⁷ The majority of European states participated in the negotiations leading to the Peace; commentators have suggested it was the first congress of Europe.³⁸ Among other things, the Peace granted member states of the crumbling Holy Roman Empire the right to treat with nations outside the Empire, and it provided that European states might take collective action to repel aggression.³⁹ Each state had a moral obligation to protect each other and to provide victims of aggression with "advice and arms."⁴⁰ As Professor Schachter has observed, this regime bore some resemblance to the more formalized Concert of Europe of the nineteenth century, but the Concert of Europe was designed primarily to

³⁴ *Id.* at 176, 177. In his view, natural law could serve as a "gap-filler," for example, when interpreting a peace treaty that dealt ambiguously with restitution and reparations. *See id.* at 389. For more on Grotius's views on interpretation, see Bela Vitányi, *Treaty Interpretation in the Legal Theory of Grotius and Its Influence on Modern Doctrine*, 14 NETH. Y.B. INT'L L. 41 (1983).

³⁵ GROTIUS, *supra* note 28, at 172-73.

³⁶ *See* J.G. Starke, *The Influence of Grotius upon the Development of International Law in the Eighteenth Century*, in GROTIAN SOCIETY PAPERS 162, 162 (C.H. Alexandrowicz ed., 1972); NUSSBAUM, *supra* note 15, at 113. Grotius's influence appears to have declined by the latter half of the eighteenth century, however, and his book is now of largely historical interest. *See* Van Vollenhoven, *Grotius and Geneva*, in 6 BIBLIOTHECA VISSERIANA 1, 17-18, 30-34 (1926) (minimizing Grotius's importance in eighteenth century thought), *cited in* Starke, *supra*, at 162 n.2; *but cf.* Starke, *supra*, at 164, 176 (arguing that Grotius continued to inspire later thinkers "as the creator of the first satisfactory comprehensive framework of the new science of the law of nations."). For more on Grotius generally, *see*, for example, EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* (1969); PETER HAGGENMAKKER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* (1983); Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477, 481 n.8 (1982) (citing other sources).

³⁷ *See, e.g.*, WHEATON, *supra* note 18, at 69 ("The peace of Westphalia, 1648, may be chosen as the epoch from which to deduce the history of the modern science of international law.").

³⁸ *See* NUSSBAUM, *supra* note 15, at 115 (explaining that it may have been one of the first congresses); *see* BOZEMAN, *supra* note 17, at 513-16 (describing earlier efforts to foster constitutionalism on the international plane).

³⁹ Treaty of Peace, Oct. 24, 1648, arts. I-III, 1 Consol. T.S. 198, 319-22; *see* NUSSBAUM, *supra* note 15, at 116-17.

⁴⁰ Treaty of Peace, *supra* note 39, at 319.

maintain a balance of power, whereas the Peace of Westphalia was founded more on a sense of moral obligation to assist states under attack.⁴¹ Although the parties to the Peace never mounted a "collective war" against aggression, the Peace reinforced the notion that states might use law to regulate international relations.⁴²

In the seventeenth and eighteenth centuries naturalist concepts continued to dominate writings on treaty law, but a positivist response began to build. Spinoza thought that treaties would bind states only so long as national interests were not threatened.⁴³ Hobbes warned that "covenants, without the sword, are but words, and of no strength to secure a man at all."⁴⁴ As treatymaking increased, moreover, scholarly writing focused more on contemporary state practice rather than examples from antiquity, the methodology favored by Grotius and other naturalists.⁴⁵ In 1737, the Dutch jurist Cornelius van Bynkershoek published *Questions of Public Law*, a study of the law of war and the law of nations that gave short shrift to natural law, focusing instead on treaties and other forms of positive law.⁴⁶ In 1758, Emmerich de Vattel, a Swiss diplomat, published *Le Droit des gens*.⁴⁷ Vattel embraced natural law and sought to apply it to the everyday practice of states, which in his view evidenced natural law. But Vattel also drew an explicit distinction between the "natural" or "necessary" law of nations and the "positive" law of nations, which consisted of conventional, customary, and "voluntary" law.⁴⁸ Like

⁴¹ See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 470 (1991) (asserting that the Peace reflected a sense of "common responsibility," not balance of power).

⁴² Treaty of Peace, *supra* note 39.

⁴³ BARUCH SPINOZA, TRACTUS THEOLOGICO-POLITICUS 139 (Wernham trans. 1958), referred to in NUSSBAUM, *supra* note 15, at 146.

⁴⁴ THOMAS HOBBS, LEVIATHAN 123 (R. Tuck ed., 1991).

⁴⁵ Grotius himself relied almost exclusively on examples from antiquity in *De Jure Belli ac Pacis*. See, e.g., GROTIUS, *supra* note 28, at 167 (describing the Roman Senate's views on legislative consent to treaties).

⁴⁶ See NUSSBAUM, *supra* note 15, at 168 (citing CORNELIUS VAN BYNKERSHOEK, QUESTIONS OF PUBLIC LAW (1737)).

⁴⁷ See EMMERICH DE VATTEL, THE LAW OF NATIONS (Johnson ed., 1863).

⁴⁸ *Id.* at xvi (preface). Unlike the "necessary" law, which bound a state in its external relations, the "voluntary" law of nations bound a state only "against her own conscience." *Id.* at xiv. Earlier naturalists like Christian Wolff and Grotius had drawn a similar distinction. See, e.g., GROTIUS, *supra* note 28, at 158. American courts have occasionally entertained analogous concepts. See, e.g., *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 210 (1825) ("[T]he law of society has left most of such [moral] obligations to the interior forum, as the tribunal of conscience has been aptly called . . .").

Grotius, Vattel endorsed the doctrine of *pacta sunt servanda*,⁴⁹ but he also supported the doctrine of *rebus sic stantibus*, arguing that significant changes in circumstances could justify unilateral termination of a treaty.⁵⁰

These developments anticipated the full-bodied positivism that emerged in the late eighteenth and nineteenth centuries. The German writer Johann Jakob Moser⁵¹ found the law of nature indeterminate and instead sought to compile a voluminous amount of treaties, diplomatic notes, and other sources of positive law to support more general propositions about international law.⁵² But his emphasis on observation and reporting overwhelmed his efforts to provide a coherent synthesis of the law.⁵³ His countryman Georg Friedrich von Martens⁵⁴ admitted some role for natural law, particularly in defining the "natural" rights of states, but he also advanced a positivist vision of international law.⁵⁵ His *Recueil des principaux traites*, begun in 1791, remained a principal collection of treaties well into the twentieth century. Von Martens also published a treatise, the *Precis du droit des gens moderne de l'Europe fonde sur les traites et l'usage*,⁵⁶ which employed the positivist method—that is, careful attention to treaties and other source materials—to develop a system of the "rights" of nations.⁵⁷ Positivism reached its height in the writings of the English philosopher John Austin.⁵⁸ In his view, law existed only as a command.⁵⁹ Since no higher sovereign could command states,

⁴⁹ See VATTEL, *supra* note 47, at 229 (asserting that treaties create "sacred" legal obligations).

⁵⁰ See *id.* at 260. Thus, Vattel argued that a prince who promises to help defend another state may later ignore that commitment if forced to use all military resources for self-defense. *Id.* Vattel nonetheless called for a "cautious and moderate" application of *rebus sic stantibus*. *Id.* at 261.

⁵¹ Johann Jakob Moser (1701–1785).

⁵² See NUSSBAUM, *supra* note 15, at 176–79.

⁵³ See *id.* at 178.

⁵⁴ Georg Friedrich von Martens (1756–1821).

⁵⁵ See NUSSBAUM, *supra* note 15, at 180–83.

⁵⁶ GEORG FRIEDRICH VON MARTENS, *PRECIS DU DROIT DES GENS MODERNE DE L'EUROPE FONDE SUR LES TRAITES ET L'USAGE* (1789).

⁵⁷ See NUSSBAUM, *supra* note 15, at 181–85. At the turn of the century, interestingly, he also published the first "casebook" on international law. See GEORG FRIEDRICH VON MARTENS, *ACCOUNTS OF MEMORABLE CONTROVERSIES OF THE MORE RECENT EUROPEAN LAW OF NATIONS* (1800–1802), cited in NUSSBAUM, *supra* note 15, at 181. Unlike Langdell's famous casebook on Contracts, which appeared almost a century later, von Martens's casebook was not explicitly designed for a law school classroom.

⁵⁸ John Austin (1790–1859).

⁵⁹ See AUSTIN, *supra* note 8, at 133, 201.

international law was not law at all, but "positive morality" akin to the rules of honor. Not surprisingly, Austin had little use for natural law.⁶⁰

These intellectual developments coincided with a dramatic increase in treatymaking and treaty interpretation in the nineteenth century. The Final Act of the Congress of Vienna, signed by the major powers of Europe, brought formal end to the Napoleonic wars and established fixed boundaries in Europe.⁶¹ The Vienna settlement also led to a semiformal system of consultation called the Concert of Europe.⁶² The Concert envisioned that the great powers would meet periodically to deal with threats to the existing balance of power in Europe.⁶³ This emphasis on stability suited a continent rattled by the French Revolution and dominated by conservative regimes. The Concert helped keep the peace during the first half of the nineteenth century, but it was unable to prevent the unrest of 1848 or clashes like the Crimean War, the Franco-Prussian War, and the First World War. Still the Concert changed the way states conducted diplomacy, for it "habituated statesmen to thinking on a new plane, more systematic and institutional than before."⁶⁴ The institutional framework, the balance of power, was expressed in treaties. Indeed, treaties became the currency of diplomacy. Diplomats embarked on an era of unprecedented interest in treatymaking and treaty interpretation. Statesmanship "often revolved around the interpretation of treaties," which were "regarded as the fundamental basis of international relations."⁶⁵

⁶⁰ See *id.*

⁶¹ See Act of the Congress of Vienna, June 9, 1815, 64 Consol. T.S. 454 (french text) (also referred to as the "Final Act of the Congress of Vienna").

⁶² See *Traité Entre la Grande-Bretagne et l'Autriche*, Nov. 20, 1815, 64 Consol. T.S. 296, art. VI ("les Hautes Parties Contractantes sont convenues de renouveler, à des époques déterminées . . . des réunions consacrées aux grands intérêts communs . . ."). This bilateral agreement was concluded as part of the Definitive Treaty of Peace of Nov. 20, 1815, 64 Consol. T.S. 251. Other major powers signed similar bilateral instruments. See *id.* These and other treaties constitute what the text refers to as the Vienna settlement. See generally HENRY A. KISSINGER, *A WORLD RESTORED* (1957).

⁶³ The Concert has also been called the Metternich System, named for Austria's foreign minister Klemens von Metternich, its principal architect. Metternich's diplomacy became the subject of a doctoral dissertation and book by a future American foreign minister, Henry Kissinger. See generally KISSINGER, *supra* note 58. For more on the Congress and Concert, see THEODORE S. HAMEROW, *THE BIRTH OF A NEW EUROPE* (1983); HENRY A. KISSINGER, *DIPLOMACY* 78-102 (1994); G. MANGONE, *A SHORT HISTORY OF INTERNATIONAL ORGANIZATION* (1954); H. NICHOLSON, *THE CONGRESS OF VIENNA* (1946).

⁶⁴ Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555, 565 (1979).

⁶⁵ David J. Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1, 2 (1988).

Diplomacy did not center around scholastic debates over natural law. Contract, not status, governed relations among states. This "contract" model of international relations—what I call "Treaty"—had reached new heights.

The ascendancy of treaties was not confined to security matters. After a brief decline in the Napoleonic era, the volume and importance of treaties on commerce, monetary policy, consular relations, and judicial assistance also increased dramatically in Europe during the nineteenth century.⁶⁶ In addition, the second half of the nineteenth century saw the first multilateral conferences on subjects other than politics and security. Thus, in 1863, states sent delegates to a postal conference and the first Geneva Red Cross Conference.⁶⁷ The first Red Cross Convention⁶⁸ on humanitarian law emerged in 1864, beginning a tradition of law-making multilateral treaties that has become an important and innovative source of international law in the twentieth century.

During this period, even diplomatic failures occasionally helped foster a belief in the utility of treaty relations. In response to Russia's efforts to disavow the provisions of the Paris agreement⁶⁹ neutralizing the Dardanelles, the great powers issued the London Declaration, which provided that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement."⁷⁰ This pronouncement was intended to reject the doctrine of invalidity for changed circumstances, or *rebus sic stantibus*, which had been approved by Vattel and invoked by Russia to justify its position.⁷¹ It thus embraced a highly stable concept of treaties, with few if any grounds for invalidity.⁷² Treaty doctrine thus affirmed the traditional rule of *pacta sunt servanda*. Treaty was at its political and doctrinal zenith.

During the twentieth century Treaty has disintegrated politically and doctrinally. The First World War erupted despite the elaborate network of

⁶⁶ See NUSSBAUM, *supra* note 15, at 203–15.

⁶⁷ See *id.* at 200.

⁶⁸ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1964, 129 Consol. T.S. 361. Multilateral treaties now account for much of humanitarian law, treaty law, diplomatic law, terrorism, and other fields. See *infra* part III.

⁶⁹ Peace Treaty, March 30, 1856, art. 11, 13, 14, 15 Martens Nouveau Recueil 770.

⁷⁰ The London Declaration, Jan. 17, 1871, 18 Martens Nouveau Recueil 278, *quoted in* Bederman, *supra* note 65, at 3.

⁷¹ See generally Bederman, *supra* note 65, at 17–29 (providing an "intellectual history" of the London Declaration).

⁷² The strength of the doctrine was arguably evidenced by the onset of World War I, when allies honored peacetime alliances and thereby became wartime allies. But that experience is more commonly thought to demonstrate the poverty of balance-of-power politics. See Vagts & Vagts, *supra* note 64, at 576 (citing contemporary accounts).

alliances designed to preserve the balance of power. The end of the Great War in turn ushered in an ambitious scheme of collective security to replace the failed balance-of-power system: the League of Nations.⁷³ The League was organized as a loose confederation of states from all around the world, not just Europe and North America. It was designed to prevent aggression and to provide a forum for peaceful resolution of disputes.⁷⁴ President Woodrow Wilson had campaigned for the League as a means to establish "not a balance of power, but a community of power."⁷⁵ Americans had long regarded the balance of power as unfair to weaker states, and they were eager to do away with it.⁷⁶ But the League proved too weak a replacement. Hobbled by America's failure to join, it responded ineffectually to Japanese aggression in Manchuria in 1931, and ultimately, the expansionism of Nazi Germany.⁷⁷

The demise of the League also marked the beginning of the decline of Treaty. In theory, the League exalted treaties, for it sponsored the Treaty of Versailles⁷⁸—the agreement to end the War to End All Wars—as well as the Kellogg-Briand Pact of 1929,⁷⁹ formally outlawing war. But these instruments, like the League itself, were bitter failures. The Treaty of Versailles suffered for lack of the equilibrium that had stabilized treaty relations in the preceding century. The treaty required Germany to pay huge amounts in reparations to other states, stirring resentment and fueling the rise of the Nazi party.⁸⁰ The Kellogg-Briand Pact was dead on arrival, flouted repeatedly in the 1930s and most flagrantly in World War II. Kellogg-Briand is now derided as the worst

⁷³ See generally The Covenant of the League of Nations, June 28, 1919, 225 Consol. T.S. 195, 195 (dedicating parties to seek "international peace and security" and the abolition of war).

⁷⁴ See *id.* art. 13, at 199 (providing for arbitration in the event that disputes cannot be resolved diplomatically).

⁷⁵ E.H. BUEHRIG, *WOODROW WILSON AND THE BALANCE OF POWER* 260 (1955), quoted in Vagts & Vagts, *supra* note 64, at 576 n.74. For more on Wilson and the League, see N. GORDON LEVIN, JR., *WOODROW WILSON AND WORLD POLITICS* 168–82 (1968).

⁷⁶ See Vagts & Vagts, *supra* note 64, at 576.

⁷⁷ See generally JAMES A. JOYCE, *BROKEN STAR: A STORY OF THE LEAGUE OF NATIONS (1919–1939)* (1978); THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD*. (1992); F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1960).

⁷⁸ Treaty of Peace, June 28, 1919, 225 Consol. T.S. 188.

⁷⁹ Treaty for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

⁸⁰ For more on the politics of the interwar period, see GEORGE ORWELL, *THE ROAD TO WIGAN PIER* (1958); DAVID SCHOENBAUM, *HITLER'S SOCIAL REVOLUTION* (1980); and RAYMOND J. SONTAG, *A BROKEN WORLD, 1919–1939* (1971).

example of Wilsonian naiveté, the paradigm of the ineffectiveness of treaties.⁸¹ These instruments, along with the Covenant of the League itself, died in the catastrophe of World War II. From a political if not a doctrinal standpoint, the "decades of blood and steel"⁸² marked the death of Treaty.

The creation of the United Nations in 1945 did not immediately resurrect Treaty, at least not in security matters. World War II resulted in a bipolar world, dominated by the two superpowers, that bore little relation to the multipolar world of nineteenth century Europe. In this new world, the only relevant balance of power was that between the United States and the Soviet Union. Thus, Cold War politics quickly overwhelmed the multilateral political system envisioned by the United Nations Charter, as superpower vetoes paralyzed the Security Council. Security problems were governed in theory by the United Nations Charter and in reality by a constant tug-of-war between the superpowers. Arms control treaties eventually helped stabilize the bilateral balance of power, but they were not central to the day-to-day conduct of international relations.⁸³

To be sure, the end of the Cold War has rejuvenated the United Nations Security Council. This development may have breathed new life into international law, but it has not necessarily rejuvenated Treaty. In fact, I will argue in Part III that the rise of the Security Council has not restored Treaty to its classical heights, but instead has inaugurated a new era of international relations governed by legislation, in which a few states have dictated the terms of security for everyone else.⁸⁴

Outside security matters, the postwar era has given birth to "legislative" multilateral agreements that generally have more influence on today's international law than the traditional bilateral contract-like treaty. Beginning with the four Geneva Conventions on humanitarian law, concluded in 1949, the

⁸¹ See, e.g., MARK LINCOLN CHADWIN, *THE WARHAWKS* 47 (1968) (quoting one skeptic's view that "political entanglement cannot be avoided by verbal incantations"). Nonetheless, the Kellogg-Briand Pact is still in force. And its idealistic theme has parallels in popular culture. See, e.g., PAUL SIMON & ART GARFUNKEL, *Last Night I Had the Strangest Dream*, on WEDNESDAY MORNING 3 A.M. (CBS Records 1962) (imagining that the world had outlawed war).

⁸² Arnold Toynbee, Commentary, in *2 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967*, at 1232 (Israel ed. 1967), quoted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1229 (1991).

⁸³ For an excellent introduction to U.S. foreign policy in the Cold War, see STEPHEN E. AMBROSE, *RISE TO GLOBALISM* (2d ed. 1980). For more recent perspectives on the Cold War, see LOUIS J. HALLE, *THE COLD WAR AS HISTORY* (1991); THOMAS G. PATERSON, *ON EVERY FRONT* (1992).

⁸⁴ See *infra* part III (elaborating on the consequences of the move from Treaty to Legislation).

international community has enacted a series of impressive multilateral law-making treaties.⁸⁵ These range from humanitarian law and human rights law to the law of diplomatic and consular relations, problems of terrorism and, of course, the law of treaties. In a sense, these instruments represent a partial triumph for the notion that international agreements can govern behavior of states—partial because some (such as those on diplomatic relations) have been more effective in practice than others (such as those on human rights). But as with the reborn Security Council, these developments also mark the rise of a legislative model of international law, albeit a model founded more on direct democracy than representative democracy.⁸⁶

Finally, the doctrinal evolution of Treaty in this century has paralleled that of Contract in that it has disintegrated (progressed?) from classical bright-line rules to romantic fuzzy logic. The law of treaties, like that of contracts, has recently been codified, and the codification has opened up a host of doctrinal struggles. Like Contract, Treaty has recognized that some unilateral promises might be binding, but has failed to establish a limiting principle. Like Contract, Treaty has struggled to define when changed circumstances might justify termination. Like Contract, Treaty has suggested that agreements may be invalid if they violate public policy. The next part of this Article examines and critiques these doctrinal developments.

II. DOCTRINAL DEVELOPMENT, DOCTRINAL DISINTEGRATION

A. *Formation: Unilateral Promises and Promissory Estoppel*

Treaty has always shared much with Contract. Both require mutual assent, freely given.⁸⁷ Both have adopted interpretive tools that look on pre-agreement

⁸⁵ See, e.g., Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Vienna Convention on the Law of Treaties, *supra* note 5.

⁸⁶ Again, this theme is taken up in more detail in Part III.

⁸⁷ Compare RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (requiring mutual assent and consideration) and *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971) (voiding modification on grounds of duress) with Vienna Convention on the Law of Treaties, *supra* note 5, arts. 9 (requiring consent of treating states), 52 (providing that a treaty is void if procured by coercion), 1155 U.N.T.S. at 335, 344.

negotiations with some suspicion.⁸⁸ Contract remedies are obviously better developed than treaty remedies, which only occasionally involve money damages or injunctive relief and more typically rely on the threat of reciprocity—the threat that one's trading partner will stop shipping over widgets, or the threat that one's extradition partner will stop shipping over fugitives.⁸⁹ Yet even this difference may be overstated. Businesspeople honor their contracts for many of the same reasons as states—they may fear retaliation, or more commonly, they do not wish to jeopardize a mutually beneficial long-term relationship for short-term gain. Moreover, the reciprocity sanctions contemplated by background treaty law are often supplemented by more biting sanctions in treaties providing for recognition and enforcement of arbitral awards,⁹⁰ treaties establishing international criminal tribunals,⁹¹ and even treaties on human rights.⁹²

Still, Treaty differs from Contract in important respects.⁹³ One obvious difference is choice of law. A treaty is governed by international law, a

⁸⁸ Compare RESTATEMENT (SECOND) OF CONTRACTS §§ 209–17 (1981) (describing parol evidence rule) with Vienna Convention on the Law of Treaties, *supra* note 5, art. 32, 1155 U.N.T.S. at 340 (providing for resort to *travaux préparatoires* in some circumstances).

⁸⁹ Compare RESTATEMENT (SECOND) OF CONTRACTS §§ 347–77 (1981) (describing expectancy, reliance, restitution and specific performance) with Vienna Convention on the Law of Treaties, *supra* note 5, art. 60, 1155 U.N.T.S. at 346 (providing for termination or suspension).

⁹⁰ See, e.g., N.Y. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; Algiers Accords (Declaration of Algeria Concerning Settlement of Claim), Jan. 19, 1981, U.S.-Iran, points 2–6, 20 I.L.M. 223 (1981) (providing for establishment of U.S.-Iran Claims Tribunal).

⁹¹ Agreement for Prosecution and Punishment of Major War Criminals of the Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589; cf. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing war crimes tribunal for the former Yugoslavia).

⁹² See, e.g., [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221; RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS 646 (1991) (asserting that the European Convention “has established the most effective [human rights] enforcement regime yet known, regional or universal”).

⁹³ Many commentators have issued stern warnings against analogies between Treaty and Contract. See, e.g., EVANGELOS RAFTOPOULOS, THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES 207–54 (1990) (arguing that legislative consensus, not contractual consent, is a more appropriate analogy for Treaty); SHABTAI ROSENNE, THE MODERN LAW OF TREATIES 128 (1989) (arguing that the contract analogy is “simply false” because, among other reasons, breach cannot be remedied through courts);

contract by municipal law—that is, the law of a particular state.⁹⁴ In some respects this distinction may be breaking down. It is possible to develop and apply international law to a contract between states or even private parties. The United Nations Sales Convention is one example.⁹⁵ But it is more difficult to imagine applying any one state's municipal law to, for example, a multilateral treaty on diplomatic immunity. First, most states do not *have* a fully developed municipal law on diplomatic immunity or other subjects of international law; reception of international law into municipal law has been notoriously difficult.⁹⁶ Second, a state is not likely to entrust interpretation of its international obligations to a foreign legal system over which it has no control.

In addition, the law of treaty formation differs from that of contract formation. Though classical treaty doctrine had more bright lines than today's law, classical Treaty never quite reached the formalist heights of classical Contract. For example, there has never been much of a doctrine of "offer and acceptance" in treaty law because there has been little need for one. States do not negotiate treaties with a "battle of the forms"; they work with a joint text and hash out every detail together at the negotiating table. States thus have no need for a statutory nightmare like U.C.C. Section 2-207.⁹⁷ The chief problem in divining mutual assent of states has been one of agency: who can sign for the state? Treaty law addresses this problem with bright-line rules⁹⁸ that would have been the envy of the drafters of Section 2-207.

see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 147 (1987) (asserting that such analogies should be drawn with "caution").

Nonetheless, the U.S. Supreme Court seems comfortable with the analogy. *See, e.g.,* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) (asserting that a treaty is "in the nature of a contract between nations"); Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) (similar); Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (The Chinese Exclusion Case) (similar).

⁹⁴ Vienna Convention on the Law of Treaties, *supra* note 5, art. 2(1)(a), 1155 U.N.T.S. at 333 (defining treaties as international agreements "governed by international law").

⁹⁵ Convention on Contracts for the International Sale of Goods, 19 I.L.M. 671 (1980). The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 90, applies international law to the enforcement of some contracts.

⁹⁶ *Cf. infra* part III.B (discussing the self-executing treaty doctrine).

⁹⁷ *Cf.* Letter of Professor Grant Gilmore to Professor Robert S. Summers, Sept. 10, 1980, reprinted in RICHARD E. SPEIDEL ET AL., SALES AND SECURED TRANSACTIONS (5th ed. 1993) 513–15 (describing § 2-207 as a "miserable, bungled, patched-up job").

⁹⁸ *See* Vienna Convention on the Law of Treaties, *supra* note 5, art. 7(2), 1155 U.N.T.S. at 334 (authorizing signature by heads of state, foreign ministers, heads of diplomatic missions, representatives to international organizations, and other persons designated by their government as having "full powers" to sign).

Treaty also differs from Contract in the substance of the exchange. There has never been a doctrine of consideration in treaty law, much less an insistence on "mutuality of obligation" or "bargained for exchange."⁹⁹ Nor has treaty required anything equivalent to the civil-law requirement of *causa*—a formal attribute that distinguishes a binding promise from a nonbinding one.¹⁰⁰ Instead, a treaty merely requires an international agreement between consenting states.¹⁰¹ Once the parties ratify such an agreement, the rule *pacta sunt servanda* makes the treaty immediately binding upon them.¹⁰² As in municipal contract law, a treaty may later be set aside for fraud or duress, or performance may be excused on grounds of impossibility or, perhaps, changed circumstances.¹⁰³ For formation purposes, however, an agreement is enough. The law of treaties has thus recognized that executory agreements are binding even in the absence of partial performance. The agreement itself, and not one party's reliance, is the basis for liability.

It is this characteristic that supposedly distinguishes Contract from Tort: that individuals might create legal duties for themselves merely by making reciprocal promises, and nothing more. And yet some commentators dispute whether common-law Contract itself has long recognized liability based solely on executory agreements.¹⁰⁴ Even today, when Contract supposedly does

⁹⁹ Compare RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981) (bargain) and 1 WILLISTON, CONTRACTS §§ 37-49, 104-05A (3d ed. 1957) (mutuality) with Vienna Convention on the Law of Treaties, *supra* note 5, art. 2(1)(a), 1155 U.N.T.S. at 333 (defining "treaty" simply as a written "international agreement" governed by international law).

¹⁰⁰ See Rubin, *supra* note 2, at 21 (describing *causa*); Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 630-39 (1919) (describing development of *causa*).

¹⁰¹ Vienna Convention on the Law of Treaties, *supra* note 5, art. 2(1)(a), 1155 U.N.T.S. at 333.

It is unclear whether the law of treaties also requires a written instrument. Compare *id.* (requiring a writing) with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 301 cmt. (asserting that customary international law does not require a writing). Of course, the same might be said of the law of contracts. Compare Law Reform Act (Enforcement of Contracts), 1954, 2 & 3 Eliz. 2, ch. 34 (Eng.), discussed in E. ALLAN FARNSWORTH, CONTRACTS § 6-1, at 393 nn.8-9 (2d ed. 1990) (repealing much of the English Statute of Frauds) with *id.* §§ 6-2 to 6-12, at 396-460 (discussing the vagaries of the typical American statute).

¹⁰² Vienna Convention on the Law of Treaties, *supra* note 5, art. 26, 1155 U.N.T.S. at 339.

¹⁰³ See *id.* arts. 49 (fraud), 51-52 (coercion), 61 (impossibility), 62 (changed circumstances), 1155 U.N.T.S. at 344-47.

¹⁰⁴ Compare MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 161 (1977) and Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87

enforce purely executory agreements, damage awards may in practice reflect the aggrieved party's reliance interest, not the more "contract-based" expectancy interest.¹⁰⁵ A small kernel of liability based solely on executory contracts may remain, but the real action is reliance-based.

To those who believe Contract is dead, the obituary appears in Section 90 of the First and Second Restatements of Contracts, which currently provides, in part: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."¹⁰⁶ Under Section 90, a person can be liable for her promise even if she received no consideration for it; it is enough that she knew or should have known her promise would induce someone else to rely on it to his detriment.¹⁰⁷ Although courts and commentators sometimes speak of this reliance as a "substitute" for consideration,¹⁰⁸ and the Restatement itself labels Section 90 an example of a "contract without consideration," Section 90 is not really a substitute for consideration at all. It is an entirely different basis of liability, one that more resembles Tort.¹⁰⁹ Like Tort, which seeks to avoid future costs by holding the tortfeasor liable for the cost of his accidents, promissory estoppel avoids future reliance costs by holding the promisor liable for the cost of his promises.¹¹⁰ Professor Gilmore contrasts Section 90 with the Restatement's provision requiring consideration. "Perhaps what we have here is Restatement and anti-Restatement. . . . The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up."¹¹¹ In fact, Restatement and anti-

HARV. L. REV. 917 (1974) with A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 543-47 (1979).

¹⁰⁵ See Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936) (describing the "reliance interest").

¹⁰⁶ RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

¹⁰⁷ See, e.g., *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 169 (Mo. Ct. App. 1959) (holding corporation liable for promise to pay an employee \$200 per month upon retirement).

¹⁰⁸ See, e.g., *Middle E. Banking Co. v. State St. Int'l Bank*, 821 F.2d 897, 907 (2d Cir. 1987) (describing reliance as a "substitute" for consideration) (citing *Allegheny College v. National Chautauqua Bank*, 159 N.E. 173 (N.Y. 1927) (Cardozo, J.)); *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898); see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1087 (1985).

¹⁰⁹ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

¹¹⁰ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 95 (4th ed. 1992).

¹¹¹ GILMORE, *supra* note 1, at 61; see Dalton, *supra* note 108, at 1087-89 (expanding on this point).

Restatement still do cohabit, perhaps largely because contract doctrine still instructs the courts to ask first whether there is consideration; it then turns to promissory estoppel as an alternative, a sort of last resort. By privileging the doctrine of consideration, the law of contract has made it seem more important than reliance, even though the latter may be just as tenable a basis for enforcement in many or even most cases.¹¹²

The same doctrinal struggle has emerged in treaty law. The most authoritative source of treaty law, the Vienna Convention on the Law of Treaties,¹¹³ does not explicitly recognize a doctrine of promissory estoppel.¹¹⁴ There is no "anti-Vienna Convention" to match the Vienna Convention itself.¹¹⁵ But the concept of estoppel has been repeatedly applied by international tribunals, and the notion of promissory estoppel in particular has apparently been endorsed by the World Court.¹¹⁶

¹¹² As Professor Dalton puts it: "[C]ourts apply the doctrines [of consideration and promissory estoppel] sequentially; only if they find no consideration do courts invoke detrimental reliance. This ensures, however precariously, that consideration will not lose out to reliance." Dalton, *supra* note 108, at 1090. *But cf.* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 908 (1985) (arguing that "promissory estoppel is no longer merely a fall-back theory of recovery").

¹¹³ Even the United States, which has not ratified the Vienna Convention on the Law of Treaties, regards it as "the authoritative guide to current treaty law and practice." CARTER & TRIMBLE, *supra* note 82, at 79.

¹¹⁴ The Restatement of U.S. Foreign Relations Law does discuss promissory estoppel in a reporter's note to § 301. "It is not clear whether such [binding unilateral] declarations are seen as unilateral agreements governed by the law applicable to international agreements, or having legal effect on some other basis, such as principles analogous to estoppel." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 n.3, at 151-52.

¹¹⁵ Article 45 of the Vienna Convention arguably embodies a narrow form of estoppel. It restricts a state's right to invalidate, terminate or suspend a treaty if it has expressly or impliedly recognized the validity of the treaty in the past. If the rationale for this provision is that other states will rely on a state's reaffirmation of its treaty obligations, then the term estoppel may be appropriate. If, on the other hand, the provision is intended to bind the affirming state even absent reliance by other states, then the term estoppel, with its emphasis on reliance, appears misplaced. *See* Vienna Convention on the Law of Treaties, *supra* note 5, art. 45, 1155 U.N.T.S. at 343. *Cf.* SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 104, 309-10 (1989) (expressing skepticism over use of the term in connection with Article 45).

¹¹⁶ Some state practice also supports the proposition that unilateral declarations may have legal effect. In 1957, following its nationalization of the Suez Canal, Egypt issued an elaborate unilateral declaration detailing its intentions for future operation of the Canal. Egypt registered the declaration with the United Nations as if it were a treaty. *See* Declaration (With Letter of Transmittal to the Secretary-General of the United Nations) on

Coincidentally, one of the first relevant World Court cases, *Legal Status of Eastern Greenland*,¹¹⁷ came down only a year after the birth of promissory estoppel in the first Restatement of Contracts in 1932. In *Eastern Greenland*, the Court held that Norway was bound by its Foreign Minister's unilateral declaration that Danish plans for sovereignty over all of Greenland "would meet with no difficulty on the part of Norway."¹¹⁸ But the Court's decision did not turn on any Danish reliance on Norway's promise.¹¹⁹ Instead, as commentators have noted, the Court emphasized that the declaration had taken place in the context of negotiations and that Norway was responding to a Danish inquiry in which Denmark promised to acquiesce in Norwegian sovereignty over Spitzbergen.¹²⁰ As an estoppel case, then, *Eastern Greenland* would seem to have limited precedential value. It holds that a unilateral declaration may have binding force when given in the context of negotiations—specifically, in response to a diplomatic concession by another state.

the Suez Canal and the Arrangements for its Operation, Apr. 24, 1957, 265 U.N.T.S. 299 (containing the text). States were divided on whether this declaration constituted binding law, and denied its legal effect even as they continued to use the Canal. See Rubin, *supra* note 2, at 6-7. Canal users presumably take the position that Egypt's obligations are controlled solely by the 1888 Constantinople Convention, which provided for continuous operation of the Canal. Constantinople Convention, Oct. 29, 1888, 171 Consol. T.S. 241. Professor Rubin therefore concludes that Egypt is still free to revoke its declaration, but only because other states have insisted they are not relying on it. See Rubin, *supra* note 2, at 7. As Professor Rubin suggests, it might even be said that by taking no further steps to legalize its 1957 declaration, Egypt has relied on the users' implied promises not to invoke the declaration, and thus that those users are estopped from changing their position and seeking to hold Egypt to its declaration. See *id.*

¹¹⁷ (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (April 5).

¹¹⁸ *Id.* at 71.

¹¹⁹ Nor, for that matter, did the Court express much doubt about whether the "declaration" was a promise—a commitment—rather than a mere statement of intention. The Norwegian Foreign Minister said that "the Norwegian government would not make any difficulties [*ne ferait pas de difficultés*] in the settlement of this question." *Id.* at 70 (providing English and French texts). The Court referred to this statement as a "promise." See *id.* at 73 ("The promise was unconditional and definitive.").

It is at least open to question whether the Norwegian government intended to commit itself to a course of conduct, as opposed to merely expressing an intention without making a commitment. In domestic legal systems, "promissory" estoppel requires a "promise," not just a mere statement of intent. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

¹²⁰ See Rubin, *supra* note 2, at 4-5; Thomas Franck, Editorial Comment, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612, 615 (1975).

The Court applied something like estoppel in its 1951 decision in the *Fisheries Case*,¹²¹ in which the Court rejected the United Kingdom's challenge to Norway's maritime border delimitation on the grounds that for "more than sixty years the United Kingdom Government itself in no way contested it."¹²² A decade later, in *Concerning the Temple of Preah Vihear*,¹²³ the Court applied a similar concept in another boundary dispute, this involving sovereignty over a promontory containing a temple of cultural and religious significance to both Cambodia and Thailand. The Court held that Thailand had acquiesced in a map placing the temple in Cambodian territory and was therefore estopped to object to it.¹²⁴ Several Judges differed on whether there was any reliance to justify estoppel, or indeed whether reliance was required at all.¹²⁵

In addition, the World Court has apparently applied estoppel to its own jurisdiction. The *Case of Certain Norwegian Loans*¹²⁶ held that a defendant state (Norway) was entitled to "rely" on limitations in the plaintiff state's (France's) unilateral declaration accepting the Court's compulsory jurisdiction, at least where the defendant's declaration was conditioned on reciprocity. The extent of the defendant's actual reliance was unclear; it seems unlikely that Norway would have rejected the Court's compulsory jurisdiction had France submitted a broader declaration. In any event, the Court declined to extend this rationale in *Nicaragua v. United States*,¹²⁷ in which it held that the (defendant) United States could not rely on a limitation in Nicaragua's declaration accepting jurisdiction—a limitation that Nicaragua could withdraw from jurisdiction immediately, without the six-month wait provided for in the United States declaration. After *Nicaragua* the precise contours of the doctrine of "jurisdictional estoppel" remain unclear.¹²⁸

The Court apparently endorsed a doctrine of promissory estoppel in *North Sea Continental Shelf*.¹²⁹ One issue in the case was whether the Federal Republic of Germany was bound by the delimitations provision of the Geneva

¹²¹ (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

¹²² *Id.* at 138.

¹²³ (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15).

¹²⁴ *Id.* at 34.

¹²⁵ *Id.* at 37 (Alfaro, J., separate opinion), 62–65 (Fitzmaurice, J., separate opinion), 96–97 (Koo, J., dissenting), 131 (Spender, J., dissenting), 70 (Quintana, J., dissenting).

¹²⁶ (Fr. v. Nor.), 1957 I.C.J. 9 (July 6).

¹²⁷ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 8).

¹²⁸ For more on this subject, see Megan L. Wagner, Comment, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777, 1789–1804 (1986).

¹²⁹ (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 26 (Feb. 20).

Convention on the Continental Shelf,¹³⁰ which the Federal Republic had signed but not ratified.¹³¹ Denmark and the Netherlands argued that the Federal Republic should be bound "because, by conduct, *by public statements and proclamations*, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime"¹³² The Court seemed to approve the concept of promissory estoppel, but found it inapplicable to the facts of the case:

[I]t appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, *in reliance on such conduct, detrimentally to change position or suffer some prejudice*. Of this there is no evidence whatever in the present case.¹³³

Perhaps the most interesting case on unilateral declarations is the Court's 1974 decision in *Nuclear Tests*.¹³⁴ Australia and New Zealand had asked the Court to declare France's atmospheric nuclear tests in the Pacific illegal. The Court found the lawsuit "moot" because France had made unilateral statements promising not to conduct further above-ground tests.¹³⁵ The Court regarded these statements as legally binding even though they were not made in the context of negotiations (as in *Eastern Greenland*), many of them were not written down, and some were intended primarily for domestic consumption in television interviews and other informal settings. Indeed, the Court's opinion did not regard reliance as an essential element for liability at all:

An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, *nor even any reply or reaction from other States*, is required for the declaration to take effect¹³⁶

¹³⁰ April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. The text is also reprinted at 52 AM. J. INT'L L. 858 (1958).

¹³¹ *North Sea Continental Shelf*, 1969 I.C.J. at 25.

¹³² *Id.* (emphasis added).

¹³³ *Id.* at 26 (emphasis added).

¹³⁴ (Austl. v. Fr.), 1974 I.C.J. 253, 267 (Dec. 20); *see also* *Nuclear Tests*, (N.Z. v. Fr.), 1974 I.C.J. 457, 472 (Dec. 20) (a companion case).

¹³⁵ *Nuclear Tests*, 1974 I.C.J. at 271-72.

¹³⁶ *Id.* at 267 (emphasis added).

The Court thus adopted a rule that has been generally rejected in most municipal legal systems—that gratuitous promises alone can be binding, provided that they are made with the intent to be bound.¹³⁷ It seems safe to say that this rule is an extension of the precedents laid down in the *Eastern Greenland* and *Temple of Preah Vihear* cases.¹³⁸ More recently, the Court has emphasized that a state should be bound by its unilateral promise only where there is clear evidence of intent to be bound.¹³⁹ But it has not repudiated the basic rule in *Nuclear Tests*—that unilateral promises can be binding even in the absence of reliance.

Is the rule in *Nuclear Tests* justifiable? Indeed, one might ask more broadly whether it is ever appropriate to enforce unilateral promises in international law, even if they do not induce reliance. States make and break unilateral promises all the time. Diplomatic history is the history of broken promises. There may be reasons to treat a state's broken promises differently than that of an individual's.

One possible reason relates to our moral assessment of the promisor. There is a moral component to an individual's promise that is perhaps less discernible in the promise of a huge bureaucratic entity like a state.¹⁴⁰ We can speak of the character of an individual more easily than the character of a foreign ministry, a collection of hundreds or thousands of bureaucrats. Even our language bears this out: Individuals who break promises are said to be reneging, or worse, lying,¹⁴¹ whereas states who break such promises are said to be engaging in diplomacy.¹⁴² In a complex world, a United States Secretary of State has direct control only over the broadest issues of policy; the day-to-day conduct of routine foreign relations is always delegated to assistant secretaries, who in turn

¹³⁷ See FARNSWORTH, *supra* note 3, at 49–51 (citing cases); Arthur T. von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1016–17 (1959).

¹³⁸ See generally Rubin, *supra* note 2, at 3–24 (arguing that the *Nuclear Tests* decision went beyond precedent).

¹³⁹ See *Frontier Case (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 573–74 (1986) (distinguishing *Nuclear Tests* on the grounds that, in a boundary dispute involving only two parties, “there was nothing to hinder the Parties from manifesting” an intention to be bound “by the normal method: a formal agreement on the basis of reciprocity”).

¹⁴⁰ Cf. CHARLES FRIED, *CONTRACT AS PROMISE* 14–17 (1981) (describing the “moral obligation” of promise); *Webb v. McGowin*, 168 So. 196, 198, *cert. denied*, 168 So. 199 (Ala. 1936) (holding that “moral obligation” is a “sufficient consideration” for a later promise in certain circumstances).

¹⁴¹ See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 152 (1978) (“If I make a promise, knowing I shall break it, I am lying”).

¹⁴² Cf. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 72 (1948) (defining diplomacy as “the patriotic art of lying for one’s country.”).

rely on deputy assistant secretaries, desk officers, attorneys, and foreign service officers in embassies abroad.¹⁴³ On most issues, decisionmaking is spread among a number of actors, and therefore cannot be identified with any single personality.

This caricature of the modern state, however, denies any possibility of state responsibility. In reality, the bureaucratic character of modern states rarely precludes moral evaluation of their behavior. Personification of states is a staple of foreign policy discourse. Large bureaucracies commonly regard each other as everything from outlaws and renegades to friends and even "cousins." Our politicians and television commentators do not hesitate to pass judgment on the moral character of foreign states. Large bureaucratic corporations, moreover, are routinely held to their unilateral and bilateral promises in our domestic legal system.¹⁴⁴ And even if states embody larger bureaucracies than most corporations, they are still led by individual men and women. The broken promises that matter most are those broken by presidents, foreign ministers and ambassadors, not by their less visible subordinates. Leaders can surely make moral judgments about one another.

In any event, morality—empathy for the promisee—is not the only explanation for our domestic law of promissory estoppel. To be sure, there may be a moral component to promissory estoppel doctrine,¹⁴⁵ but moral norms do not alone explain contract law. A contract system founded on the notion that promise-keeping is a moral duty would enforce all gratuitous promises, even those made in social settings, and those that did not induce reliance. Contract does not. All legal systems distinguish between binding and nonbinding promises.¹⁴⁶ Similarly, a contract system founded on morality would distinguish sharply between benign and malicious promise-breaking. Again, contract does not. Although courts have sometimes suggested that they might punish willful breach more severely than benign breach, in practice they have considered willfulness as a factor only in determining the measure of actual damages.¹⁴⁷ Courts have generally declined to go further and award punitive damages for breach of contract, even for malicious breach.¹⁴⁸

¹⁴³ See 22 U.S.C. § 2658 (1992) (providing that the Secretary of State may delegate functions to other officers and employees).

¹⁴⁴ See, e.g., *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (enforcing unilateral resolution by corporate board of directors).

¹⁴⁵ Cf. *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (holding that nonenforcement would be "grossly inequitable").

¹⁴⁶ See Rubin, *supra* note 2, at 22.

¹⁴⁷ See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939) (imposing higher measure of actual damages on breaching party because, among other things, its breach was willful). But cf. *Jacob & Youngs, Inc. v. Kent* 129 N.E. 889, 891 (N.Y. 1921)

An alternative explanation for promissory estoppel is that it deters careless promises that may induce costly reliance on the part of the promisee.¹⁴⁹ Promissory estoppel doctrine is efficient because it gives the promisor incentive to make only those promises whose expected benefits to the promisor outweigh their expected costs to the promisee. If, for example, a man promises his granddaughter \$2000 and she relies on his promise by quitting her job, he may be liable for the cost she incurs in reliance.¹⁵⁰ If he knows in advance that he will be liable for the granddaughter's reliance costs, he will balance the benefit of making his promise against the expected cost to him of his granddaughter's reliance, and he will refrain from making the promise if it is likely to cost him money—that is, if it is likely to cause more harm than good in the aggregate. In this sense promissory estoppel resembles tort doctrine, which gives an actor incentive to engage in an activity only if its expected value to the promisor outweighs its expected costs to a victim or victims. In addition, promissory estoppel doctrine guards against the “moral hazard” problem by imposing a limit on the promisee's reliance—namely, a requirement that the promisor “reasonably expect” that the promise will induce reliance.¹⁵¹ Such a rule ensures that efficient promises are not overdeterred. Similarly, tort doctrine

(Cardozo, J.) (“The willful transgressor must accept the penalty of his transgression. . . . The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.”) (citations omitted).

¹⁴⁸ See, e.g., *White v. Bentkowski*, 155 N.W.2d 74 (Wis. 1967) (declining to award punitive damages against people who maliciously breached contract to permit the flow of water to their neighbors).

¹⁴⁹ See, e.g., POSNER, *supra* note 110, at 97.

¹⁵⁰ This hypothetical is loosely based on *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898). In fact, the *Ricketts* court, like most courts, focused on detriment to the promisee, not benefit to the promisor. Courts assume, understandably, that the cost to the promisee exceeds any speculative benefit to the promisor. Nonetheless, a gratuitous promise may benefit the promisor by enhancing his reputation or securing the possibility of a return promise in the future. Indeed, assuming that promisors generally act rationally, it follows that promisors generally do not make gratuitous promises that do not benefit them in some sense. An efficient doctrine of promissory estoppel might conceivably balance expected benefit to the promisor against expected harm to the promisee. Cf. Farber & Matheson, *supra* note 112, at 920–24 (stressing the importance of benefit to the promisor in promissory estoppel doctrine).

The *Ricketts* court appears to have enforced the \$2000 promise rather than awarding reliance damages to the granddaughter. Cf. *infra* at 32–34 (discussing remedies).

¹⁵¹ See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). Oddly, U.S. promissory estoppel doctrine focuses on the promisor's expectation that the promisee rely reasonably, not on whether the promisee's reliance was in fact reasonable. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 Cal. L. Rev. 1, 31 & n.67 (1985).

may guard against the moral hazard by imposing a defense of contributory negligence.¹⁵²

Does this economic argument for domestic promissory estoppel doctrine apply to its doctrinal counterpart in international law? More generally, do we care whether public international law is efficient at all? A major purpose of any system of contract law is to facilitate economic exchange, to promote an efficient distribution of goods and services. But is that the major purpose of public international law?

A significant number of treaties, perhaps a plurality, concern trade and economic matters. According to one study, the United States negotiated more treaties on economic policy and trade than any other subject between 1946 and 1973.¹⁵³ The next most popular type of treaty during that period related to cultural and technical matters; many of these agreements doubtless had economic implications.¹⁵⁴ The remaining classes of agreement—ranging from military matters to diplomatic immunity and transportation and communication—constitute only a minority of those negotiated by the United States, and in any event many of these also have obvious economic ramifications.¹⁵⁵ Another study indicates that the “overwhelming majority” of multilateral treaties are “economic in nature.”¹⁵⁶ There is little reason to believe that economic agreements have lost any importance in recent years, a period in which the United States has, among other things, embarked on an aggressive campaign to negotiate Bilateral Investment Treaties with major trading partners.¹⁵⁷ In practice, then, one major function of treaties, like contracts, has been to promote economic advancement.

Economic analysis can also shed light on the law’s treatment of noneconomic treaties. Our domestic contracts, so often the subject of economic analysis, are not devoted purely to “business” matters. First-year law students

¹⁵² See POSNER, *supra* note 110, at 169 (“The law needs a concept of victim fault in order to give potential victims proper safety incentives.”).

¹⁵³ See LOCH K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 3–19 (1984) (noting that “[a]bout 37 percent of all agreements examined in this study were in this area . . .”).

¹⁵⁴ See *id.* at 17 (estimating that 27 % of U.S. agreements during that period related to cultural and technical matters).

¹⁵⁵ See *id.*

¹⁵⁶ See John K. Gamble, *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT’L L.J. 1, 15 (1980). According to Gamble, 59% of multilateral treaties concluded between 1919 and 1971 were devoted to economic matters. The next most common type of multilateral treaty, “political” agreements, constituted only 27% of the multilaterals concluded in that time period. See *id.*

¹⁵⁷ See Richard Lawrence, *U.S. Accelerates Effort to Build Global Investment Treaty Network*, J. COM., Aug. 24, 1992, at A2.

quickly learn that people can make contracts about all sorts of things outside the realm of "business." Thus, the first-year canon includes cases in which the purpose of the contract ranges from inhibiting a nephew's drinking and gambling¹⁵⁸ to watching the coronation of Edward VII from a nice vantage point.¹⁵⁹ If we can find economic consequences in such transactions, surely we can also find economic consequences in a bilateral investment treaty or a multilateral trade agreement.

Indeed, economic analysis can help illuminate all facets of public international law, not just treaty law. As Professor Abbott has observed, modern international relations theory assumes that states are unitary, rational actors that generally seek to maximize their own well-being.¹⁶⁰ Although this assumption does not explain all behavior of states, it does comport with much state practice, and it seems at least as warranted as the common assumption that individuals generally seek to maximize their own well-being. Even a noneconomic agreement like an extradition treaty can be said to promote efficiency, since the requesting state will typically "value" the presence of the accused much more highly than the requested state. Treaty law, like contract law, can and should encourage efficient agreements.¹⁶¹

The weakness of international enforcement mechanisms does not imply that it is fruitless to apply economic analysis to international law. It is true that the international legal system is in many respects a primitive one.¹⁶² As Richard Posner has suggested, however, primitive legal systems often adopt informal, decentralized sanctions and incentives that promote efficient behavior, albeit imperfectly.¹⁶³ These enforcement mechanisms include sharing, gift-giving,

¹⁵⁸ *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

¹⁵⁹ *Krell v. Henry*, 2 K.B. 740 (1903).

¹⁶⁰ See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L. L. 335, 348-51 (1989).

¹⁶¹ In fact, it would be difficult to use treaty rules to redistribute income rather than promote efficiency because treaty partners would simply bargain around a redistribution rule. Wealthier states would presumably exact a higher treaty "price," be it a political or economic price. There may be good reason to redistribute wealth to poorer states, but direct foreign aid or U.N.-sponsored relief are likely to be more effective than the treaty law for this purpose. Cf. Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223 (1972) (arguing that contractual rules are not well-suited for redistribution of wealth).

¹⁶² See generally Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT'L L. & POL. 1 (1986). Dinstein argues that international law resembles primitive law in some ways, for example in the importance of custom and retaliation and the link to religion, and that it differs in others, for example in the short list of norms in primitive law as opposed to the extensive variety of international legal norms.

¹⁶³ See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 146-73 (1981). Posner adds that "the primitive social equilibrium is less efficient, in the long run, than that of advanced

moral duties, restitutionary remedies, and even violent self-help¹⁶⁴—institutions all found in modern international relations. Posner suggests that these mechanisms work better when the population is immobile, since people must live with each other even if they violate social norms.¹⁶⁵ Immobility, of course, is a characteristic of the international community; states cannot hide from their neighbors. International law has, moreover, established some (admittedly weak) organs of government, including a World Court and a Security Council whose decisions are generally followed. Economic analysis can help evaluate whether this evolving system operates efficiently.

Is international promissory estoppel efficient? Suppose a state makes a gratuitous promise to another state to defend the promisee's western frontier in the event of attack, and the promisee relies on that promise by defending its western flank lightly. If the promisor reneges on the promise, and the promisee suffers because a third state attacks its western front, the promisee can of course seek reparations from the attacker. But if that remedy fails, can the promisee seek reparations from the promisor?

One answer is that the promisor should be bound because its unperformed promise has harmed its former ally, and liability will deter such cost-inducing promises in the future. The promisor-state, like an individual promisor, is the "least cost avoider," the entity that has the most information about its future behavior. It is in the best position to prevent harm to the promisee by avoiding rash promises in the first place. Other things being equal, the law should promote the efficient solution—the one that gives incentive to insure to the more efficient "cost-avoider," the promisor.

A possible objection to this argument is that even if a promisor-state is in the best position to avoid making a reckless promise (or to perform a promise once made), promisee-states are almost never justified in relying on a promise. Promisee-states may have much more information about the promisor than an individual promisee in a domestic legal relationship. Promisee-states possess vast intelligence networks that can sometimes predict what other states will do in advance. The promisor's bureaucracy will often contain competing factions that hold different views on the proposed course of action, and those factions

societies," and cites as evidence the "very small proportion of the world's population that lives in primitive societies today." *Id.* at 205. This analysis might imply that the international "social equilibrium" is comparatively more efficient, since the decentralized system of international relations has persisted for millennia. In my view, however, a system of world government would be more efficient than the current international regime, but strategic behavior and information and transaction costs have thus far interfered with the establishment of such government.

¹⁶⁴ See *id.* at 154–55 (sharing), 157 (generosity), 159 (moral duties), 175 (restitution), 158 (self-help).

¹⁶⁵ See *id.* at 162.

may not always communicate those views to each other—perhaps because they are too busy, perhaps because they distrust one another—until the decision is imminent. A foreign promisee-state that has wiretapped *all* elements of such a bureaucracy may actually have a more cohesive picture of the whole than the promisor-state's decisionmakers. In such a circumstance, any reliance by the promisee might be unreasonable. Indeed, reliance by the promisee-state seems particularly unreasonable given that a promisor-state sometimes cannot predict its own future behavior. Promisor-states may have much less information about their *own* future behavior than individual promisors. Individual promisors are the sole custodians of their intentions. States, on the other hand, may never be sure what they will do next. Such prediction depends on intangibles like the outcome of the next election, the aggressiveness with which various portions of the bureaucracy advance their interests, and the like.

Nonetheless, a doctrine of international promissory estoppel should attempt to distinguish between "reasonable" and "unreasonable" reliance, much as municipal doctrine does.¹⁶⁶ Unfortunately, the doctrine enunciated in the *North Sea Continental Shelf Cases* does not clearly draw such a distinction. Such a rule would help guard against the moral hazard problem and thereby ensure that promises are not overdeterred. Thus, a superpower would not be entitled to disarm unilaterally in reliance on a weak state's promise to defend it. Conversely, a small state might be entitled to rely on a strong state's promise to defend it, but only to a reasonable extent, for example by deferring costly defense appropriations.

A "reasonable reliance" rule is also consistent with the likely distribution of information between the parties. Despite the existence of intelligence networks, promisee-states will still usually have incomplete information about the promisor's actual intentions, implying that some reliance by the promisee may be reasonable. In general, promisor-states probably will have more information about their own intentions than promisee-states. A promisee-state's spy network is itself a large bureaucracy operating within an even larger bureaucracy. Like all bureaucracies, it will make mistakes. Even if such an intelligence network can gather information from each relevant bureaucracy of the promisor-state, some of the information will inevitably be incomplete, unreliable, or even misleading. And even if the intelligence network gathers accurate information, it may not share it with all relevant actors in its own

¹⁶⁶ Actually, U.S. domestic law does not necessarily examine the reasonableness of the promisee's reliance. The RESTATEMENT (SECOND) OF CONTRACTS (1981) asks whether the promisor "should reasonably expect" the promisee to rely, not whether the promisee's reliance is reasonable. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1). According to one commentator, this phrasing suggests that courts "are reluctant to inquire into the reasonableness" of the promisee's reliance. Cooter, *supra* note 151, at 31 & n.67.

political system. Intelligence agencies routinely obtain mountains of data, and they must sift it and analyze it for their clients to make any use of it. Inevitably, some relevant information must be truncated, distorted, or lost.¹⁶⁷ Not surprisingly, the bureaucratic character of modern corporations has not prevented the application of promissory estoppel doctrine even when the promisee is a sophisticated multinational.¹⁶⁸

Another objection to "international promissory estoppel" is that it may be difficult to know when a state has actually made a promise. A modern nation-state speaks with a thousand tongues, some authoritative and some not.¹⁶⁹ On which of these can another state safely rely? In *Nuclear Tests*,¹⁷⁰ France was held to be bound by officials' statements in television interviews, among other things. This result is startling, to say the least. Treaty doctrine seeks to avoid such a result by limiting the class of people who can sign treaties and by requiring some formal evidence of intent to be bound internationally, namely an "international agreement governed by international law."¹⁷¹ Like the doctrine of consideration, treaty doctrine performs an evidentiary function.¹⁷²

¹⁶⁷ See Myres S. McDougal et al., *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 368-69 (1973) (noting that an intelligence receptor is inundated by a "barrage of sensory stimuli which it is practically incapable of ingesting"). Indeed, political actors in our own domestic system routinely complain about the manner in which raw intelligence is chopped down to size and filtered for consumption by the end user.

¹⁶⁸ See, e.g., *Mahoney v. Delaware McDonald's Corp.*, 770 F.2d 123, 127 (3d Cir. 1985) (holding McDonald's liable in promissory estoppel for breaching its promise to lease a building from plaintiff after plaintiff bought it).

¹⁶⁹ Even the most sophisticated states contradict themselves. Recently, for example, Secretary of State Warren Christopher disavowed the views of the third-ranking official in the State Department, Peter Tarnoff, who argued that the United States has withdrawn from a leadership role in the post-Cold War world. See Steven A. Holmes, *Christopher Reaffirms Leading U.S. Role in World*, N.Y. TIMES, May 28, 1993, at A6; John M. Goshko, *Administration Rushes to 'Clarify' Policy Remarks by 'Brand X' Official*, WASH. POST, May 27, 1993, at A45.

¹⁷⁰ (Austl. v. Fr.) 1974 I.C.J. 253, 268 (Dec. 20); (N.Z. v. Fr.) 1974 I.C.J. 457, 472 (Dec. 20).

¹⁷¹ See Vienna Convention on the Law of Treaties, *supra* note 5, art. 7, 1155 U.N.T.S. at 334 (establishing who may sign and setting forth formal requirements in Article 2).

¹⁷² See ROBERTO UNGER, *LAW IN MODERN SOCIETY* 203-16 (1976); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-06 (1941).

In fact, there is some uncertainty about whether treaty law requires a writing. Compare Vienna Convention on the Law of Treaties, *supra* note 5, art. 2(1)(a), 1155 U.N.T.S. at 333 (requiring a writing) with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 301 cmt. (1987) (asserting that customary international law does not require a writing). Contract law is only slightly more clear on this point. Compare E. ALLAN FARNSWORTH,

Still, there may be good reasons to relax the writing requirement in international promissory estoppel, just as municipal doctrine does. A "Statute of Frauds" may be a relatively cheap means of facilitating bilateral bargains, but imposing a writing requirement on unilateral promises inducing reliance implies that some inefficient but unwritten promises will be undeterred. Moreover, an international Statute of Frauds may not be necessary to distinguish authorized promises from unauthorized ones. If municipal law can identify the proper agents of large multinationals, surely international law can identify the proper agents of nation-states.

It may make more sense, however, to require a writing before enforcing a unilateral promise that does not induce reliance. In general, enforcing such promises is efficient because doing so enhances their value to the promisee, at relatively little cost to the promisor.¹⁷³ An enforceable promise is worth more to the promisee than an unenforceable promise. Requiring such promises to be in writing might deter a few of them, but this effect might easily be offset by the greater certainty that a written promise provides. A writing requirement would serve a "channeling" function—that is, it would "channel" this new legal institution, the binding unilateral promise, into a recognizable form.¹⁷⁴ A form helps the drafter of an instrument select specific legal channels of communication, making it easier for her to select particular types of legal consequences. In the international context, a formal requirement would help establish a new category of binding written promises for states to request and provide in appropriate circumstances. Under this regime, a state would have the option of clearly delineating which of its unilateral promises are legally binding and which are morally binding. Promisee-states would know instantly which promises can be counted on and which cannot. A writing requirement would add a convenient new tool to the diplomat's bag of tricks.

On the other hand, a writing requirement might lead states to discount unwritten promises even more than they do now. In other words, while written promises might be worth more under such a regime, unwritten promises would be worth less. States might begin to insist on getting everything in writing, no

CONTRACTS § 6.1, at 393 & nn.8–9 (2d ed. 1990) (discussing repeal of much of the English Statute of Frauds) *with id.* §§ 6-2 to 6-12, at 396–460 (discussing the vagaries of the typical American statute).

¹⁷³ This reasoning grows out of Judge Posner's argument to justify enforceability of gratuitous promises in domestic law. See Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411–13 (1977), reprinted in A. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 46–47 (1979). "The size of [a] gift (in present-value terms) will be increased at no cost to [the donor]. Here is a clear case where the enforcement of a gratuitous promise would increase net social welfare." *Id.* at 47.

¹⁷⁴ See Fuller, *supra* note 172, at 800.

matter how trivial, since the spoken word would have no value. The result might be a shift from a flexible diplomacy of conversation and argument to a more rigid diplomacy of diplomatic notes and responses.

But such a scenario seems exceedingly unlikely. States always will be willing to trust some nonbinding promises—probably the less important ones. States trust one another's assurances not because they might be legally binding, but because it is in the promisor's interests not to renege too often.¹⁷⁵ Even if a new category of "binding unilateral promises" tends to "ratchet up" diplomacy to a more formal level, states can be encouraged to retain the option of the informal, nonbinding promise by making it more difficult to make a binding promise—for example, by imposing an additional formal requirement like ratification. Adding a new species of binding promises would not detract from informal diplomacy; it would simply expand the options of promisors and promisees. Just as states are free to choose among treaties of widely different levels of formality and legal effect—ranging from an exchange of notes, to a memorandum of understanding, to a formal multilateral convention—so states should be free to choose among a variety of unilateral promises.

In sum, economic analysis supports liability for written promises that do not induce reliance as well as promises that do. What remedies, then, are appropriate for nonperformance of a binding unilateral promise or nonperformance of a promise inducing reasonable reliance?

The remedies provided in the Vienna Convention on the Law of Treaties are inapplicable to unilateral promises made outside the context of an agreement. The Vienna Convention provides for suspension or termination of a treaty in response to breach.¹⁷⁶ This is a remedy of rescission, not damages. It is obviously irrelevant to a case involving a gratuitous promise, since the promisee never owed the promisor a reciprocal performance in the first place. The Vienna Convention, however, is not the only source of remedies for nonperformance of promises. State responsibility doctrine mandates reparations for breach of a substantive obligation under international law.¹⁷⁷ There is no conceptual reason that this doctrine could not apply to unilateral promises.

¹⁷⁵ Indeed, some would argue that self-interest motivates most compliance with international law. See, e.g., Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1, 32 (1991); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990); Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation*, 25 TEX. INT'L L.J. 209, 257 n.274 (1990).

¹⁷⁶ See Vienna Convention on the Law of Treaties, *supra* note 5, art. 60, 1155 U.N.T.S. at 369 (providing for termination or suspension in response to a "material breach").

¹⁷⁷ See HENKIN ET AL., *supra* note 14, at 545.

One could imagine, for example, an "expectancy" theory of reparations for breach of a gratuitous promise that does not induce reliance. On an expectancy theory of reparations, the promisor would be obliged to put the promisee in the position the promisee would have been in had the promise been performed. This theory could require enforcement of the terms of the promise—a specific performance remedy, the perfect expectancy measure—or damages approximating the disappointed promisee's expectations. This remedy ensures that the promisee attaches the correct "expected value" to the promise when it is made. The remedy would be admittedly generous when compared to the rescission remedy for breach of treaty, but that simply implies that expectancy damages should be available for breach of treaty as well as breach of a binding unilateral promise. As in contract law, an expectancy remedy would be more efficient than the rescission remedy, which does not adequately deter breach.¹⁷⁸

The remedy in international promissory estoppel doctrine should be the "reliance" measure. On this theory, the promisee is placed in the position it occupied before the promise was made. This remedy is efficient because it factors the promisee's actual damages into the promisor's decision to make and perform a promise. It is analogous to strict liability in tort, in that the promisor is liable regardless of whether the promisor's nonperformance was negligent. As in tort, the moral hazard problem can be controlled by placing limits on the victim's behavior. In tort, this can be achieved by establishing a contributory negligence defense to strict liability. In promissory estoppel, it can be achieved by establishing a "reasonableness" limit on the promisee's reliance.

Unfortunately, these remedies—expectancy for the gratuitous promise, reliance for promissory estoppel—are not likely to be efficient when applied in the international context. The likelihood of enforcement is so low that almost any damage remedy will underdeter the making of inefficient promises. This problem can be addressed by greatly increasing the size of the damage remedy, so that the expected cost of breach resembles its actual cost. As the literature on the economics of crime indicates, this solution can be more efficient than relying on more frequent and more likely enforcement, since enforcement costs are high.¹⁷⁹ But if states, like individuals, are risk-averse, then extremely high damages will overdeter promises because states will not want to take any chance that their treasuries will be depleted. Moreover, there is no tradition of punitive damages in international law, suggesting that the costs of imposing such a remedy may be high. It may be best to rely on the simple expectancy

¹⁷⁸ Cf. POSNER, *supra* note 110, at 119, 121 (discussing some of the merits of the expectancy measure).

¹⁷⁹ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979).

and reliance measures and focus attention on improving what enforcement mechanisms do exist.

To summarize, the World Court has created a potentially open-ended basis for state responsibility—the “contort” of making a unilateral promise. The Court has even suggested that an informal, internal statement might give rise to such liability, even without a showing of substantial detrimental reliance by another state. A doctrine of promissory estoppel alone seems justifiable on the international plane, since the promisor is probably the least cost avoider. Enforcement of gratuitous promises in the absence of reliance is still an entirely different matter, potentially exposing states to liability for every utterance, no matter how contradictory. To control the gratuitous promise doctrine, the Court or an appropriate law-making convention should clarify that gratuitous promises that do *not* induce reliance are binding only when made with clear intent to be bound. That intent could be demonstrated by a writing signed by a high-ranking state official, or perhaps even by ratification through the state’s normal constitutional processes.

It is too soon to tell whether the World Court’s decisions in *Nuclear Tests* and the *North Sea Continental Shelf Cases* will revolutionize Treaty the way Section 90 of the First Restatement of Contracts revolutionized Contract. Such cases will not reach the World Court or any other international tribunal very often, if only because negotiation is the normal means of dispute resolution on the international plane. Yet there are no indications that the Court is prepared to do away with these holdings. Perhaps some future international conference will codify the rule in the next iteration of the Vienna Convention on the Law of Treaties, thereby proclaiming the demise of Treaty in the treaty on treaties itself—a mild irony. *Le Roi est mort: vive le Roi*.

B. Invalidity: From Status to Contract to Status

If promissory estoppel challenges the traditional doctrine of *pacta sunt servanda*, it does not threaten the positivist assumption that underlies treaties—that international law depends on the consent of states, whether expressed in an international agreement or a unilateral declaration. Another recent doctrinal development, however, presents such a threat.¹⁸⁰ Article 53 of the Vienna Convention on the Law of Treaties provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general

¹⁸⁰ See CARTER & TRIMBLE, *supra* note 82, at 98–99 (noting that the Vienna Convention “introduces” *jus cogens* and that “this kind of super-constitutional law is obviously inconsistent” with positivist approaches).

international law.”¹⁸¹ The Article defines a “peremptory norm”—also known as *jus cogens*—as a generally accepted norm “from which no derogation is permitted,” one that can be modified only by a subsequent norm “having the same character.”¹⁸² Article 64 provides that an existing treaty becomes void if a new peremptory norm “emerges.”¹⁸³ The Vienna Convention does not give examples of peremptory norms, but the United States Restatement of Foreign Relations Law offers up a short list of candidates, including norms that prohibit genocide, slavery, war, and possibly terrorism.¹⁸⁴ Other commentators have advanced shorter and longer lists.¹⁸⁵ No one is certain just what norms are

¹⁸¹ Vienna Convention on the Law of Treaties, *supra* note 5, art. 53, 1155 U.N.T.S. at 344.

¹⁸² *Id.*

¹⁸³ *Id.* at 350. In addition, Article 66(a) provides for special resolution of disputes relating to *jus cogens*. It provides that any state party to the Vienna Convention may submit a dispute over Articles 53 and 64, the substantive provisions on *jus cogens*, to the International Court of Justice. *Id.* at 348. Under Article 66(b), disputes over other provisions of the Convention are supposed to be submitted to an ad hoc conciliation commission in accordance with procedures outlined in the Annex to the Convention. *Id.* In theory, then, the Convention provides for a more formalized means of resolving disputes over *jus cogens*, suggesting that the drafters viewed *jus cogens* as a doctrine of paramount importance. In practice, these dispute resolution mechanisms of Article 66 have never been applied.

Article 71 of the Vienna Convention establishes the consequences of invalidity of a treaty that violates peremptory norms of international law. *Id.* at 349. If the treaty is invalid *ab initio*, Article 71(1)(b) provides that states must “bring their relations into conformity with the peremptory norm.” *Id.* If the treaty is deemed invalid as a result of a supervening norm, Article 71(2) releases the parties from their future obligations under the treaty without affecting obligations already created, provided that those obligations persist “only to the extent that their maintenance is not in itself in conflict with the new peremptory norm.” *Id.* One interesting question is whether an entire treaty is void if only part of it conflicts with *jus cogens*. See TASLIN OLAWALE ELIAS, *THE MODERN LAW OF TREATIES* 140 (1974) (asserting that “separability is permitted,” but quoting an International Law Commission report that argues against separability).

¹⁸⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 n.6, at 34 (1987).

¹⁸⁵ Compare IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 222–24 (2d ed. 1984) (arguing that the prohibition on use of force is *jus cogens*, but that beyond that “uncertainty begins”) with Eduardo Jimenez de Arechaga, *The Law of Treaties*, 159 REC. DES COURS 9, 64–65 (1978-I) (arguing that *jus cogens* includes prohibitions against use of force, genocide, piracy, slavery, racial discrimination, hostage-taking, and possibly hijacking or trade in narcotics) and Grigory Tunkin, *International Law in the International System*, 147 REC. DES COURS 98 (1975-IV) (asserting that Soviet international lawyers accept “all fundamental principles of the present-day international law” as *jus cogens*). These and other examples are quoted at length in HENKIN ET AL., *supra* note 14, at 467–75.

"peremptory," partly because the doctrine has rarely if ever been invoked in any formal setting.

Even if this doctrine has not yet sprung to life, there should be no mistaking its startling implications. The doctrine is truly a "brooding omnipresence in the sky,"¹⁸⁶ a potentially disruptive force that has not yet been unleashed. Taken to its extreme, *jus cogens* doctrine could hold that no treaty could ever violate any existing rule of international law—a position apparently adopted by Soviet writers in the 1970s.¹⁸⁷ If this were the rule, states would never be permitted to change international law through treaty-making. For example, states would not be permitted to conclude a treaty providing for routine searches of diplomats' personal baggage to prevent terrorism, since international law currently forbids such searches in the absence of "serious grounds for presuming" that the baggage contains contraband.¹⁸⁸ The result would be the death of interesting treaties, if not the death of Treaty altogether.

In more than one sense, the doctrine suggests a movement from contract back to status. If applied aggressively, it could discourage innovation in treaty-making, and thus lead to a static system of international law. More fundamentally, the doctrine represents a further disintegration of the pure contract model of Treaty that prevailed in the nineteenth century. It suggests that states are no longer as free to order their own affairs—that some decisions have been made for them in advance. In this respect, the doctrine resembles domestic constitutionalism, which has been said to shield us from "regret," and to protect us from ourselves by ensuring that we do not trample fundamental

The International Law Commission, which drafted the Vienna Convention, refused to enumerate examples of *jus cogens* because doing so might "lead to misunderstanding" about "other cases not mentioned in the article" and because listing examples would have required "a prolonged study of matters which fall outside the scope of the present articles." *International Law Commission Report*, [1966] 2 Y.B. Int'l L. Comm'n 169, 247-49, U.N. Doc. A/CN.4/SER.A/1966.

¹⁸⁶ Cf. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

¹⁸⁷ See Tunkin, *supra* note 185, at 98, *quoted in* HENKIN ET AL., *supra* note 14, at 472.

¹⁸⁸ See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. In fact, some members of Congress have recently sought to liberalize the rules on routine searches of diplomats. See, e.g., Diplomatic Immunity Abuse Prevention Act, *reprinted in* 133 CONG. REC. S14,055 (daily ed. Oct. 8, 1987). For more on this subject, see Leslie Shirin Farhangi, Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517 (1986); Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. J. INT'L L. & POL'Y 173 (1989).

norms in the heat of the legislative moment.¹⁸⁹ But *jus cogens* lacks the legitimacy that stems from a written constitution. The United Nations Charter, the instrument that most resembles an international constitution, may provide one or two peremptory norms such as the prohibitions on human rights violations and the use of force.¹⁹⁰ Yet if *jus cogens* was intended merely to prohibit violations of Charter norms, it was unnecessary because Charter obligations already prevail over inconsistent treaty obligations.¹⁹¹ It may be that *jus cogens* was intended to establish peremptory norms beyond those expressed specifically in the Charter, such as a prohibition on terrorism. If that is the case, however, it is difficult indeed to identify the locus of legitimacy of the doctrine. The creator of *jus cogens*, the Vienna Convention on the Law of Treaties, is just another treaty itself, albeit one that codifies customary law.

Of course, the domestic counterpart of *jus cogens*, the doctrine of illegality (or public policy), does not usually depend on a written constitution for its legitimacy. It looks instead to lesser sources of law, such as legislative enactments or even nonbinding pronouncements by governmental officials. Thus, a contract term is unenforceable if it is prohibited by legislation or if its enforcement "is clearly outweighed" by a "public policy."¹⁹² In economic terms, a contract term violates public policy if it imposes unacceptable external costs on third parties.¹⁹³ Perhaps *jus cogens* can also look to less lofty sources of law to support its legitimacy. After all, the Vienna Convention formulation defines peremptory norms as those "accepted and recognized by the international community as a whole" from which "no derogation is permitted."¹⁹⁴ At least the first half of this phrase suggests a role for positive law in the creation of *jus cogens*. Perhaps, then, *jus cogens* should be conceptualized as a rule of public policy, subject to "legislative" change by the world community, rather than a rule of constitutional law, immune from change. A public policy conception of *jus cogens* might induce greater compliance than a constitutional conception. States are more likely to abide by a rule over which they have some control.

¹⁸⁹ See Robin L. West, *Taking Preferences Seriously*, 64 TULANE L. REV. 659, 661-62 (1990) (noting that many jurists regard enforcement of constitutional norms, like enforcement of private contracts, as a means of enforcing prior preferences "against later regret").

¹⁹⁰ See U.N. CHARTER arts. 2 (use of force), 55-56 (human rights).

¹⁹¹ See *id.* art. 103.

¹⁹² RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981); see *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (striking down surrogacy contract because, *inter alia*, it violated public policy).

¹⁹³ See POSNER, *supra* note 110, at 108.

¹⁹⁴ Vienna Convention on the Law of Treaties, *supra* note 5, art. 53, 1155 U.N.T.S. at 344.

As currently configured, however, the *jus cogens* doctrine resembles a rule of constitutional law more than one of public policy. Peremptory norms are more fixed and harder to change than domestic rules of public policy and perhaps even domestic rules of constitutional law. Domestic public policy can often be changed by a majority vote of the legislature, or sometimes even by an order of the executive. By contrast, a change in *jus cogens*, like a change in a constitution, requires a large supermajority.¹⁹⁵ A peremptory norm can only be modified by a subsequent norm "having the same character"—that is, another norm with the support of the international community "as a whole."¹⁹⁶ Thus, a bilateral treaty by definition could not contradict the peremptory norm. A multilateral law-making treaty might itself qualify as a new rule of *jus cogens* that could trump the old rule,¹⁹⁷ but it would probably require the concurrence of a "very large majority"¹⁹⁸ of states—a threshold rarely achieved by multilateral treaties.¹⁹⁹ Alternatively, the United Nations Security Council

¹⁹⁵ See, e.g., U.S. CONST. art. V (providing that constitutional amendments be ratified by three-fourths of the states).

¹⁹⁶ Vienna Convention on the Law of Treaties, *supra* note 5, art. 53, 1155 U.N.T.S. at 344. The general consensus is that such a norm requires the support of the "overwhelming majority" of states. See Stanislaw E. Nahlik, Book Review, 84 AM. J. INT'L L. 779, 780 (1990).

¹⁹⁷ See JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 111 (1974), *cited in* HENKIN ET AL., *supra* note 14, at 474 n.7.

¹⁹⁸ See Statement of the Chairman of the Drafting Committee, Vienna Convention on the Law of Treaties, *quoted in* HENKIN ET AL., *supra* note 14, at 473. The Vienna Convention itself arguably sets an even higher standard—consent by "the community of States as a whole . . ." Vienna Convention on the Law of Treaties, *supra* note 5, art. 53, 1155 U.N.T.S. at 344.

¹⁹⁹ The U.N. Charter is one of the few conventions that clearly meets that standard. The Statute of the International Court of Justice also meets the standard, but parties to the Charter are ipso facto parties to the Statute. See U.N. CHARTER art. 931. One hundred and fifty-two states are party to the Vienna Convention on Diplomatic Relations, so it would also appear to meet the "great" or "overwhelming" majority standard, but it establishes few if any *jus cogens* norms.

Many other fundamental treaties have not been ratified by a great majority, or in some cases even by a simple majority of states. Only 59 states are party to the Vienna Convention on the Law of Treaties. The fundamental human rights treaties barely command the assent of a majority of states. Only 90 are party to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. Only 92 are party to the International Covenant on Economic and Social Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Other human rights treaties have fared somewhat better. One hundred and twenty-five states are party to the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195. One hundred states are party to the Convention on the

might be able to make new law by invoking its broad powers under Chapter VII of the United Nations Charter. Article 25 of the Charter provides that decisions of the Council bind all states, and Article 103 provides that Charter obligations prevail over pre-existing treaty obligations. Nonetheless, as I have argued elsewhere, the Council's powers are not unlimited.²⁰⁰ I doubt that a Council resolution can supersede a peremptory norm of international law.²⁰¹ I have even suggested that the World Court may have some power of judicial review to invalidate Council resolutions that flout *jus cogens*.²⁰²

The Vienna Convention's special procedural rules for *jus cogens* also suggest that it enjoys a quasi-constitutional status. At the Vienna Conference, proponents of *jus cogens* reassured skeptics by adding a provision permitting states to take disputes over *jus cogens* to the World Court—a procedure not available for disputes over other aspects of the Convention.²⁰³ This added procedural protection apparently comforted some states, mostly those with a stake in stable treaty relations, by ensuring that *jus cogens* would not lead to an epidemic of unilateral treaty terminations; an objective observer would first have to pass judgment on the termination. It does appear that this mechanism has kept *jus cogens* in check. As of this writing, the World Court has never heard a case involving a dispute over termination of a treaty for violation of *jus cogens*, and few states have attempted to invoke the doctrine unilaterally. In any event, the Convention has entrusted the development of *jus cogens* doctrine to the international judiciary, just as many domestic constitutions entrust the development of constitutional law to a domestic judiciary.²⁰⁴ Thus far, the

Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33 (entered into force in 1980).

Only 83 states are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. Twenty-one states are party to the Hague Convention on the Taking of Evidence, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. Only 44 are party to the U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

²⁰⁰ See Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1, 28–45 (1993) (arguing that the World Court has a limited power of judicial review over Security Council resolutions).

²⁰¹ See *id.* at 33–39.

²⁰² See *id.*

²⁰³ See Vienna Convention on the Law of Treaties, *supra* note 5, art. 66(a), 1155 U.N.T.S. at 348; ELIAS, *supra* note 183, at 168–78 (describing the procedure for referral to the World Court); HENKIN ET AL., *supra* note 14, at 469–70; EDWARD MCWHINNEY, UNITED NATIONS LAW MAKING 73 (1984) (describing the provision as a “compromise” between “natural law lawyers” and “legal positivists”).

²⁰⁴ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989).

Court appears to have accepted the existence of a few peremptory norms and the notion that they may enjoy some higher status in international law.²⁰⁵

Only two decades have passed since *jus cogens* was pasted into the Vienna Convention, and so it is too early to tell how great a role the doctrine will play in the death of Treaty. Along with international promissory estoppel and the binding unilateral promise of a state, *jus cogens* is one of the principal doctrinal "signposts on the road."²⁰⁶ Indeed, it carries more radical potential than any doctrine in treaty law. Its assault on *pacta sunt servanda*, if it comes, will be led by the developing world, which may assert that *jus cogens* includes rights to peace, self-determination, development, and a clean environment.²⁰⁷ These states may advance the instrumentalist position that *jus cogens* protects the interests of third parties and the world community in general, much as public policy doctrine factors in externalities generated by private contract.²⁰⁸ Under this view, a treaty permitting seabed mining or trade in tuna might be invalid because it damages the global environment in violation of peremptory norms of international law.²⁰⁹ Thus, *jus cogens* presents at least a potential threat to traditional, contract-style Treaty. Moreover, the doctrine is here to stay. Although there was less than universal enthusiasm for *jus cogens* among the drafters of the Vienna Convention, few states voted against it.²¹⁰ Then and since, states have been reluctant to criticize the doctrine for fear of being branded scofflaws.²¹¹ In short, *jus cogens* is politically correct.

²⁰⁵ See, e.g., *Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5) (speaking of norms binding *erga omnes*); *id.* at 304 (Ammoun, J., separate opinion) (asserting that self-determination is a peremptory norm); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 40-41 (May 24) (speaking of the "fundamental character" of the inviolability of diplomatic missions).

²⁰⁶ *Allegheny College v. National Chautauqua Bank*, 159 N.E. 173 (N.Y. 1927) (Cardozo, J.) (dictum) (heralding the arrival of promissory estoppel).

²⁰⁷ Some sympathetic jurists have already started in this direction. See, e.g., *Barcelona Traction*, 1970 I.C.J. at 304 (Ammoun, J., separate opinion) (asserting that self-determination is a *jus cogens* norm). These are the so-called Third Generation of human rights—group rights that follow the First Generation of traditional individual rights and the Second Generation of economic, social, and cultural rights. See generally LILICH, *supra* note 92, at 178-85.

²⁰⁸ See Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 574 (1937) (describing the doctrine as an inquiry into the morality of treaties).

²⁰⁹ Cf. *Trail Smelter Case (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1938 & 1941) (holding Canada responsible for trans-boundary environmental harm caused by a smelter in its territory).

²¹⁰ See SZTUCKI, *supra* note 197, at 156 (describing the vote).

²¹¹ See *id.* at 157 (describing reluctance to criticize *jus cogens*).

There are other doctrinal signposts, other indications that the simple rule *pacta sunt servanda* embraced by the London Declaration in the nineteenth century is disintegrating. The most significant of these is the *clausula rebus sic stantibus*, embodied now in Article 62 of the Vienna Convention. Article 62(1) provides that an unforeseen "fundamental change in circumstances" may not be invoked to terminate a treaty unless the existence of those circumstances "constituted an essential basis of the consent" of the parties and the effect is "radically to transform the extent of obligations still to be performed under the treaty."²¹² Article 62(2) adds that parties may not invoke changed circumstances to terminate a boundary treaty and that parties may not invoke changed circumstances brought about by their own breach.²¹³ Thus, in grudging, negative language, the Vienna Convention has codified a narrow version of the controversial old rule *rebus sic stantibus*. This a century after the London Declaration rejected the doctrine in no uncertain terms.

The doctrine of *rebus sic stantibus* is obviously in tension with *pacta sunt servanda*. The drafters of Article 62 sought to minimize that tension by "privileging" the latter doctrine, much as the Restatement of Contracts "privileges" the doctrine of consideration.²¹⁴ Thus, the *rebus* doctrine is cast as a narrow exception to the general rule that treaties will be obeyed. Article 62 starts from the presumption that changed circumstances will *not* justify termination and then defines permissible grounds for termination in narrow terms. The terminating state must show that the circumstances in question were an "essential" basis and that obligations are now "radically" changed. This is a high standard to meet, and it is not surprising that this new formula has rarely if ever been invoked by an aggrieved state. Nonetheless, it would be a mistake to write off Article 62 as a meaningless piece of rhetoric.

Article 62 serves an important role. In Grotius's day, when there was doubt over whether treaties could bind a successor state or government,²¹⁵ it

²¹² Vienna Convention on the Law of Treaties, *supra* note 5, art. 62(1), 1155 U.N.T.S. at 346.

²¹³ The doctrine of *rebus sic stantibus* is analogous to the contract doctrines of impracticability and frustration. Treaty law, like contract law, also recognizes impossibility as a basis for invalidating a treaty. *See Id.* In treaty law, as in contract law, the doctrine of impossibility is less controversial than the doctrine of impracticability. *See ELIAS, supra* note 183, at 133 (asserting that the impossibility rule is a "matter of commonsense"). *But cf.* POSNER, *supra* note 110, at 104-05 (suggesting that risk allocation, not physical impossibility, is most relevant to discharge).

²¹⁴ *See Dalton, supra* note 112, at 1087 (noting that consideration analysis is privileged over reliance doctrine, which could equally well explain the result in most consideration cases); *cf.* Bederman, *supra* note 65, at 39 (asserting that *pacta sunt servanda* can be reconciled with Article 62 by narrowing the latter).

²¹⁵ *See supra* part I (describing this doctrine and Grotius's criticism of it).

was not so essential to protect later governments with a doctrine of *rebus sic stantibus*. Treaty obligations lapsed anyway. But today's treaties, like today's contracts, establish and regulate relationships for generations.²¹⁶ They are "relational."²¹⁷ Any relationship that lasts for generations is bound to undergo changes. Article 62 provides a narrow escape hatch, a rather clumsy response to inevitable change. What is odd about Article 62 is not that it recognizes the possibility of termination, but that it ignores the possibility of modification. Then again, treaty law has always permitted the parties freely to modify an agreement. There is no international "pre-existing duty rule" because there is no international doctrine of consideration.²¹⁸

Like *jus cogens*, *rebus sic stantibus* has rarely if ever been invoked in a formal setting. As with *jus cogens*, it is difficult to predict what if any role *rebus sic stantibus* will play in the death of Treaty. Again, the doctrine would appear to have the most appeal for those with radical sensibilities, for it might be used to attack treaty relationships established during the colonial era.²¹⁹ It is not as potentially destabilizing as *jus cogens*; Article 62 is quite narrowly drawn, and it explicitly excludes boundary treaties from those subject to attack on grounds of changed circumstances.²²⁰ But it has a more prestigious pedigree than *jus cogens*; *rebus sic stantibus* has existed for centuries, whereas *jus cogens* is of more recent vintage. And *rebus sic stantibus* has a stronger claim to legitimacy because it echoes the familiar contract doctrine of impracticability.²²¹ It has none of the quasi-constitutional character of *jus cogens*; it is a doctrine of positive law, not natural law.

²¹⁶ See John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1 (1984).

²¹⁷ Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

²¹⁸ Compare *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902) (invalidating modification of employment contract for lack of consideration) with Vienna Convention on the Law of Treaties, *supra* note 5, art. 39, 1155 U.N.T.S. at 341 ("A treaty may be amended by agreement between the parties.").

²¹⁹ The same, of course, can be said for the doctrine of state succession, which could conceivably permit successor states to disavow the unequal treaties concluded by the predecessor state. See generally LUNG-FONG CHEN, *STATE SUCCESSION RELATING TO UNEQUAL TREATIES* (1974).

²²⁰ See Vienna Convention on the Law of Treaties, *supra* note 5, art. 62 (2)(a), 1155 U.N.T.S. at 347.

²²¹ Cf. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (endorsing excuse for "changed circumstances" in compelling cases); U.C.C. § 2-614(1) (1994) (excusing delay or nondelivery by seller if performance is made "impracticable" by unforeseen circumstances involving a basic assumption of the parties).

In sum, treaty doctrine, like contract doctrine, has steadily disintegrated during the twentieth century. In Contract, the urge to sum up the law in a neat, clean doctrine of bright lines—the doctrine of consideration—necessarily gave way to the need to develop more flexible tools to deal with problems like reliance on gratuitous promises. In Treaty, the urge to create bright lines, which led to the London Declaration and a reaffirmation of the supremacy of *pacta sunt servanda*, is now giving way to similar imperatives. The Vienna Convention, like the Restatement of Contracts, is a collection of rules, standards and exceptions, not just rules alone. In some instances, such as the evolution of a doctrine of binding gratuitous promises, the result is an international law better adapted to the needs of modern states. In such cases, states will welcome the new diplomatic tools the law has made available. In other instances, such as *jus cogens*, the new doctrinal exceptions threaten to devour the rules that preceded them, and to lessen rather than enhance the power of states to order their own affairs. Developments like *jus cogens* may protect fundamental rights of states or individuals, but at a cost to state sovereignty. The doctrinal death of Treaty, like the death of Contract, may not be occasion for mourning, but neither is it occasion for unrestrained rejoicing.

III. DECLINE AND FALL

This part turns to the institutional demise of Treaty. It first considers the extent to which Treaty has been eclipsed on the international plane by the rise of new “legislative” sources of international law, such as the United Nations Security Council. It then explores the rise of “legislative” alternatives to Treaty in the domestic law of the United States. Finally, this part evaluates the intersection of these developments—the “Americanization” of international law.

A. *The Supremacy Clause of the United Nations Charter and the Decline of Treaties in International Law*

In the twentieth century, treaties have become increasingly multilateral. Although a numerical majority of treaties are still bilateral,²²² the multilateral treaty has played an increasingly significant role in international relations, particularly in codifying and sometimes changing international law. Some multilaterals have defined legal relations traditionally defined by bilateral treaty

²²² Most U.S. treaties, for example, are bilateral treaties. See generally U.S. DEP'T OF STATE, TREATIES IN FORCE (1992) (providing a comprehensive list).

or even custom, as in the case of diplomatic and consular immunities.²²³ Others have addressed topics that were rarely addressed in bilateral treaties, such as terrorism, human rights, women's rights, racial discrimination, the rights of the child, and pollution.²²⁴ Many of them purport to change the law for a large number of states, even for the international community as a whole, and are thus known as law-making treaties.²²⁵

Multilaterals, in other words, more resemble legislation than private contract. In substance, they affect the rights of most or all members of the community. Even the process of their creation more resembles the untidy scramble of legislation than the more orderly back-and-forth of contract negotiation. Like a legislature, a multilateral conference establishes a chair, delegates different matters to committees, and votes on the final product.²²⁶ Furthermore, multilateral "legislation" is created by direct and not merely representative democracy. At a multilateral conference, each state represents itself.

The rise of the multilateral has not itself brought about the death of Treaty. Multilaterals are, after all, treaties themselves. But the prevalence of multilaterals is further evidence that classical Treaty, the pure expression of sovereign will, has eroded on an institutional plane as well as a doctrinal one. The two parties to a bilateral negotiation have the maximum possible control over the outcome. They may be forced to compromise, but if differences are too great, they can walk away altogether and leave no residue of new international law behind them. Delegates to a multilateral conference, on the other hand, may be forced to make more compromises to hold together a consensus. A state may attempt to opt out of an objectionable provision through a reservation, but only if it is not "incompatible with the object and purpose of

²²³ See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

²²⁴ See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter *Montreal Convention*]; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516.

²²⁵ Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. f (1987) (noting that multilaterals are used for "general legislation").

²²⁶ Unlike a domestic legislature, however, a multilateral "legislature" often requires that measures be adopted by consensus. See UNITED NATIONS, REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS 48, U.N. Doc. ST/LEG/SER. B/21, U.N. Sales No. E/F.83.V.8 (1985) (noting that within the United Nations there is a "widely held belief" that "consensus rule" accelerates adoption of multilateral instruments).

the agreement.”²²⁷ Even if the state refuses to sign the instrument, it may find itself bound anyway, since a multilateral convention may constitute customary law binding even on nonparties.²²⁸ Multilaterals offer the promise of codification and unification, but at a cost to state sovereignty; bilaterals safeguard the interests of individual states, but at a cost to the orderly development of international law.

Political factors suggest that the multilateral challenge to traditional Treaty—the “legislatification” of international law—is not about to wither away. Developing states, which easily outnumber industrialized states, have an interest in multilateral treaty-making. Nonaligned states can make their voices heard more easily if they stand together than if they attempt to go it alone. Once a multilateral conference on an important topic has been convened, it is politically difficult for an industrialized state to stay away. If the state refuses to attend, or attends but refuses to accede, it will likely have to endure broad-based international criticism.²²⁹ It is therefore not surprising that multilateral conventions tend to be more radical than their bilateral counterparts. It was a multilateral treaty, after all, that established the notion that human rights might include “economic and social rights” such as a right to an “adequate standard of living,” housing, and health care.²³⁰ Few if any bilateral treaties have ever gone so far.

In a sense, however, the multilateral convention is an inherently conservative form of law-making. The consensus that enhances the legitimacy of multilaterals also discourages innovation. Not coincidentally, multilaterals are very slow in the making. Like legislatures, multilateral conferences are not designed to respond quickly to fast-breaking events. Multilaterals thus possess

²²⁷ Vienna Convention on the Law of Treaties, *supra* note 5, art. 19(c), 1155 U.N.T.S. at 337.

²²⁸ See Anthony D’Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982); Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEX. INT’L L.J. 147 (1966); cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. f (1987) (“Multilateral agreements . . . are increasingly used for general legislation, whether to make new law, as in human rights, or for codifying and developing customary law, as in the Vienna Convention on the Law of Treaties . . .”).

²²⁹ The Rio conference on International Environmental Law is the most recent case in point. See Keith Schneider, *The Earth Summit: White House Snubs U.S. Envoy’s Plea to Sign Rio Treaty*, N.Y. TIMES, June 5, 1992, at A1 (reporting on foreign criticism of U.S. refusal to sign biodiversity agreement).

²³⁰ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts. 11(1) (adequate standard of living and housing); 12 (health care), 993 U.N.T.S. 3. The Clinton Administration has recently stated that it will seek Senate advice and consent to ratification of the Economic and Social Covenant. See *Human Rights Are For All, Christopher Tells Meeting*, ATLANTA J. & CONST., June 15, 1993, at A10.

both the strengths and weaknesses of any form of direct democracy. Not surprisingly, the shortcomings of multilaterals have induced some states, notably industrialized states, to seek alternatives.

The leading alternative right now is the United Nations Security Council. If the multilateral conference is the forum for direct democracy, the Security Council is the forum for representative democracy. Until the end of the Cold War, the Council was an empty forum, paralyzed by vetoes of the United States and the Soviet Union. Now the Cold War has thawed, and the five permanent members of the Council and the ten rotating members routinely make law for the rest of the world. That law is generally respected and followed. Article 25 of the United Nations Charter obliges states to "carry out the decisions" of the Council, and even in security matters—the Iraq-Kuwait crisis being the obvious example—most states have indeed carried out the Council's dictates. These developments mark a further decline in the importance of bilateral treaty relations in maintaining the peace.

But the Security Council's recent rejuvenation has not been limited to "security" in the traditional sense of deterring armed aggression. It has ventured into such diverse matters as elections in Cambodia, starvation and internal conflict in Somalia, human rights violations in Bosnia, and the extradition of alleged terrorists from Libya. In doing so, it has sometimes exercised its power to override existing treaties. Article 103 of the United Nations Charter, the international Supremacy Clause, provides that Charter obligations prevail in the event of a "conflict" between those obligations and pre-existing treaty obligations. Thus, in 1992, the Council ordered Libya to extradite to the United States or Great Britain two men charged with the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland.²³¹ Libya sought to enjoin the Resolution in the International Court of Justice, arguing that the Resolution was inconsistent with the Montreal Convention on aircraft sabotage, which permits the requested state to extradite or submit the fugitives to its own authorities for prosecution.²³² The Court rejected Libya's request for the indication of provisional measures, citing Article 103 of the Charter: "Whatever the situation previous to the adoption of [Resolution 748], the rights claimed by Libya under the Montreal Convention cannot now be regarded as

²³¹ See S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., at 2-3, U.N. Doc. S/RES/748, *reprinted in* 31 I.L.M. 750 (1992).

²³² See Montreal Convention, *supra* note 224, art. 7, 24 U.S.T. at 571, 974 U.N.T.S. at 182. Libya also asserted, among other things, that its domestic law forbade the extradition of Libyan nationals—a provision common in the constitutions of civil-law states. See Letter from Ibrahim M. Bishari, Secretary of the People's Committee for Foreign Liaison and Int'l Cooperation, to the Secretary-General (Mar. 2, 1992), *in* 31 I.L.M. 739, 740 (1992).

appropriate for protection by the indication of provisional measures.”²³³ Thus, the Court reaffirmed the Security Council’s power to override existing treaty obligations.

This is not to suggest that the Security Council is poised to kill all treaties. Notwithstanding the Libya case, it has shown little enthusiasm for the wholesale rewriting of existing treaty obligations. Moreover, as I have suggested elsewhere, there may be some limits to the Council’s power to override fundamental norms of international law, even when the Council properly finds a threat or breach of the peace or act of aggression as required by Article 39 of the Charter.²³⁴ In my view, the World Court has a limited power of judicial review to invalidate Council resolutions that are *ultra vires* of the United Nations Charter.²³⁵ As a practical matter, the Council could do a lot of damage to existing treaty relations without coming close to its constitutional limits; fortunately, it is not inclined to do so.

But the Council does seem quite willing to create new obligations for the future where none existed. The war crimes tribunal for the former Yugoslavia, created by the Council in mid-1993, is the best case in point. The Council ordered the establishment of a fully-staffed international tribunal to prosecute “persons responsible for serious violations of international humanitarian law” in the former Yugoslavia.²³⁶ The Council’s resolution incorporated a detailed forty-eight page report of the Secretary-General setting forth a complete statute

²³³ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126–27 (Apr. 14) (“Request for the Indication of Provisional Measures”).

For more on the many interesting facets of the *Lockerbie* decision, see Watson, *supra* note 200, at 22–45; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993).

²³⁴ See Watson, *supra* note 220, at 28–45. The decision in *Lockerbie*, though it sustained the Council’s negation of Libya’s rights under the Convention and under customary international law, nonetheless suggests that the Court is willing to exercise judicial review of Security Council resolutions that violate fundamental aspects of state sovereignty or intrude on fundamental norms of international law, such as *jus cogens* principles. See *id.* at 22–28.

²³⁵ As I see it, the Court can and should exercise a limited “Jeffersonian” power of judicial review in which the effect of invalidation extends only to the case before the Court. See *id.* at 28–45. For more on Jeffersonian concepts of judicial review, see generally David E. Engdahl, *John Marshall’s ‘Jeffersonian’ Concept of Judicial Review*, 42 DUKE L.J. 279 (1992).

²³⁶ S.C. Res. 827, *supra* note 91, ¶ 2.

for the Court.²³⁷ The Secretary-General sought to depict the measure as a narrow one, noting that the resolution only covered crimes from 1991 on and did not create an all-purpose international criminal court.²³⁸ But there is no mistaking the significance of the event. In a single stroke, the Council—not a multilateral conference—established the first significant international war crimes tribunal since the Tokyo and Nuremberg tribunals of World War II, tribunals that themselves were created by multilateral conferences.

The Secretary-General conceded that this procedure was a departure from the “normal course of events,” which would involve “the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute.”²³⁹ He admitted that the treaty procedure would have permitted states “fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.”²⁴⁰ But he argued that the urgent need for action on Bosnia justified a different procedure in this case, and that negotiation and ratification of a treaty would take too long.²⁴¹ He asserted that the Council had competence to act because the situation in Bosnia constituted a threat to the peace, that the Council could establish a tribunal as a “subsidiary organ” under Article 29 of the Charter, and that the Council would not be “purporting to ‘legislate’” new humanitarian law.²⁴² Most interesting, he added that “[e]ven then, there could be no guarantee that ratifications will be received from those States *which should be parties to the treaty if it is to be truly effective.*”²⁴³

The Secretary-General is right that the situation in the former Yugoslavia constitutes a threat to the peace justifying enforcement action by the Council under Chapter VII of the Charter. A civil war that threatens to spill over into neighboring states can easily constitute a threat to the peace, and in any event the Balkan conflict can just as easily be characterized as an international conflict—thus a breach of the peace—as a civil war. If the Council can invoke Chapter VII against Southern Rhodesia for internal human rights violations, or in respect of the human rights situation in Haiti, it can surely invoke Chapter VII in the Balkan conflict.²⁴⁴

²³⁷ See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993). Resolution 808 instructed the Secretary-General to prepare the report.

²³⁸ See *id.* at 5.

²³⁹ *Id.* at 6.

²⁴⁰ *Id.* at 7.

²⁴¹ See *id.*

²⁴² *Id.* at 7–8.

²⁴³ *Id.* at 7 (emphasis added).

²⁴⁴ See S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg., at 5, U.N. Doc. S/RES/253 (1968). For a lively debate on the legality of the Rhodesia sanctions, compare Myres McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The*

But the Secretary-General's remaining argument is less convincing. His report concedes that a treaty would honor the sovereignty of states by allowing them to decide whether to adhere to it, but then asserts that some states "should be parties to the treaty if it is to be truly effective."²⁴⁵ In effect, the report says states should have the right to choose whether to adhere to a treaty, except where a state's participation is essential to the purpose of the treaty. By this logic, all states should be required to adhere to all multilateral treaties on extradition, terrorism, narcotics, human rights, and the environment, because without universal participation these instruments inevitably suffer. If so, Treaty is truly dead, at least if Treaty embraces international agreements formed by the consent of states.

In any event, one wonders precisely what states the Secretary-General thought should be party to a treaty establishing a war crimes tribunal. No doubt he has in mind Serbia and perhaps Croatia. Is Serbia any more likely to hand over Serb war criminals because the war crimes tribunal was authorized by the Security Council than by treaty? The Secretary-General's reply is that Serbia and other states are now legally obliged to "cooperate fully" with the tribunal.²⁴⁶ Another supporter of an ad hoc tribunal has also suggested that the "added factor of a Security Council demand for cooperation could provide the impetus needed to prosecute these crimes in national tribunals"²⁴⁷—that is, in Serbian courts. But what if Serbia and other states flout their new legal obligations to the tribunal? Even supporters of the ad hoc approach concede that the tribunal will probably not accomplish much but argue that the risks are outweighed by the moral implications of doing nothing.²⁴⁸

In the end, the perceived need for quick action, not a desire to impose a legal obligation of cooperation on Yugoslavia and other states, was undoubtedly the most important reason that the Security Council decided to bypass the traditional multilateral conference and set up an ad hoc tribunal itself. In this case, the Security Council was indeed able to move quicker than an international conference, at least in establishing a statute and authorizing the appointment of judges and other personnel. If the tribunal can bring itself into

Lawfulness of International Concern, 62 AM. J. INT'L L. 1, 1-19 (1968) (supporting sanctions) with Dean Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAW. 591, 591-99 (1968) (opposing them). For these and other useful materials on sanctions and southern Africa, see generally RICHARD B. LILICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS 388-484 (1991).

²⁴⁵ Report of the Secretary-General, *supra* note 237, at 7.

²⁴⁶ S.C. Res. 827, *supra* note 91, ¶ 4.

²⁴⁷ Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122 (1993).

²⁴⁸ *See id.* at 132-33, 135.

operation within a reasonable time, and if it can score one or two early successes, then the Council's action may seem well-justified.

In the future, however, the Council would do well to remember that multilateral deliberation has its own advantages. If one hundred or more states take the time and trouble to negotiate a statute for a war crimes tribunal, they are likely to have a greater political stake in its success than if the tribunal is imposed on them from above by the fifteen members of the Security Council. To be sure, the Secretary-General did collect opinions from many states and the composition and competence of the ad hoc tribunal, and it appears to have incorporated many suggestions into its report. But this process inevitably lacks the give-and-take of an in-person negotiation, and the end result is bound to leave some states feeling like they were shut out of the process. The need for inclusiveness is not especially acute in a case like the Yugoslavia war crimes tribunal, since relatively few states will have a direct stake in its deliberations. But if and when the world community seeks to create a permanent war crimes tribunal, or an international criminal court with broad jurisdiction, all states should be included in the negotiations.

Direct democracy may not work in modern nation-states, even in democratic republics, which are typically composed of millions of constituents and must rely on elected representatives to confront an endless series of issues, great and small. But the international community is a tiny one, comprising fewer than two hundred states, and when it addresses major issues that will affect most members for a long period of time, that community can still afford the luxury of counting every member's vote. There is a time and a place for representative democracy on the international plane; if quick or forceful action is required, the Security Council has shown that it can respond effectively. But a stable international order requires a broader base. The greatest challenge for international law is enforcing its norms against member states. Consent of the governed—through multilateral "legislation," or even the homely bilateral treaty—is the best hope for achieving this goal.

B. The Supremacy Clause of the United States Constitution and the Decline of Treaties in United States Law

Treaty has died a thousand deaths in United States law. The self-executing treaty doctrine has ensured that few, if any, treaties have the force of law within the United States, and that fewer still may be invoked by private parties.²⁴⁹ The Senate has given its advice and consent to treaties at a

²⁴⁹ See generally Paust, *supra* note 6 (criticizing the doctrine). It should also be noted that the doctrine exists, in some form or another, in the municipal law of many other states.

consistently slow pace. Unable to absorb all the international agreements signed by the executive branch each year, our legal system has given birth to so-called "executive agreements" that are reported to but not reviewed by Congress.²⁵⁰ Understandings, declarations and reservations clutter every multilateral treaty.²⁵¹ Our executive branch has even experimented with imaginative "reinterpretations" of treaties at odds with the understanding originally presented to the Senate.²⁵²

The self-executing treaty doctrine is the single biggest culprit. It has rewritten the Supremacy Clause, which provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."²⁵³ The doctrine now holds that a treaty is the "supreme Law of the Land" only when it is self-executing. A treaty is non-self-executing, and thus not operative as supreme law, if it "manifests an intention" that it not become effective as domestic law without implementing legislation. Thus, a treaty is non-self-executing if the Senate must give consent, if Congress by resolution requires implementing legislation, or if implementing legislation is "constitutionally required."²⁵⁴ For example, a treaty that purports to commit the United States to provide foreign aid to another state would not be self-executing because only Congress has the constitutional authority to make appropriations; some congressional implementing legislation would be required. A treaty forbidding discrimination against Japanese nationals has been held to be self-executing; the human rights provisions of the United Nations Charter have been held to be non-self-executing.²⁵⁵

Notwithstanding the absolute language of the Supremacy Clause, some version of the self-executing treaty doctrine is inevitable. It is not surprising that many other states have established variants of the self-executing treaty doctrine.²⁵⁶ Some treaties, like treaties calling for appropriations, will always

See generally U.K. NAT'L COMM. OF COMP. LAW, *THE EFFECT OF TREATIES IN DOMESTIC LAW* (Francis G. Jacobs & Shelley Roberts eds., 1987).

²⁵⁰ *See* L. MARGOLIS, *EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY* 108 (1985), *quoted in* CARTER & TRIMBLE, *supra* note 82, at 169.

²⁵¹ *See, e.g.*, Senate Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 6-10 (1992) (adding five reservations, five understandings, four declarations and one "proviso" to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171).

²⁵² *See* sources cited *supra* note 7.

²⁵³ U.S. CONST. art. VI.

²⁵⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) (1987).

²⁵⁵ *Compare* Asakura v. Seattle, 265 U.S. 332 (1924) (treaty forbidding discrimination) *with* Sei Fujii v. California, 242 P.2d 617 (1952) (U.N. Charter).

²⁵⁶ *See* THE EFFECT OF TREATIES IN DOMESTIC LAW, *supra* note 249, at xxiv-xxviii (providing an overview).

require legislative implementation. If it were otherwise, the President could use the treaty power to put Congress out of business. For example, the President could enter into a treaty acknowledging a human right to housing and requiring massive state expenditures on public housing, and then use the treaty as authority for appropriating the requisite funds unilaterally. Conversely, the President could enter into a treaty requiring a higher tax rate to support universal health care and then simply order the Internal Revenue Service to start enforcing the higher rate.

One might argue that these results would be tolerable if the Senate always had the opportunity to pass on the treaty before it became law. Currently, the Senate gives its advice and consent to only a tiny minority of international agreements, known as "treaties"; the majority of international agreements, known as "executive agreements," are merely reported to the Congress under the Case Act.²⁵⁷ A literal interpretation of the Treaty Clause would require Senate approval of each and every such agreement, for the Constitution makes no mention of executive agreements that can be merely reported to Congress²⁵⁸—just as the Supremacy Clause makes no mention of non-self-executing treaties. The logical extension of this argument proposes that if the Senate really passed on every treaty, then the self-executing treaty doctrine could be abolished because every treaty would become the law of the land upon ratification. The Senate would have a chance to pass on the President's treaty requiring appropriations for housing or raising taxes for health care, and the constitutional balance of power would be preserved. In this way, an absolute reading of the Treaty Clause could facilitate an absolute reading of the Supremacy Clause.

The obvious reply to the determined interpretivist is that the modern Senate is simply incapable of fulfilling a duty to give advice and consent to each and every international agreement, since the United States now enters into hundreds of agreements every year, far more than the Framers envisioned and far more than even an efficient Senate could handle. The Congress cannot possibly pass on every treaty before it becomes law, and therefore it is inappropriate to read

²⁵⁷ The Case Act, 1 U.S.C. § 112b (1988), requires that the Secretary of State transmit the text of any international agreement, "other than a treaty," to the Congress within 60 days after it has entered into force. Most international agreements are reported to Congress under the Case Act; the Senate gives its "Advice and Consent" to only a tiny minority of full-fledged "treaties." See MARGOLIS, *supra* note 250, at 108, *quoted in* CARTER & TRIMBLE, *supra* note 82, at 169 (noting that executive agreements far outnumber treaties).

²⁵⁸ U.S. CONST. art. II, § 2, cl. 2.

the Supremacy Clause literally—that is, to hold that all treaties are automatically the “law of the land.”²⁵⁹

Even if one concedes the foregoing proposition, which is not altogether self-evident, one might still argue that treaties should always become the law of the land even if the Senate does not always approve them. If a treaty became law without express congressional consent, the Congress would still retain the power to enact legislation nullifying the President’s treaties—provided, of course, that the President signed such legislation or Congress overrode the President’s veto.²⁶⁰ But this last-ditch power of repeal would hardly comfort Congress, which would understandably regard the President’s enhanced treaty power as a major change in the constitutional balance of power.

More importantly, as several authorities have pointed out, such a regime seems inconsistent with the constitutional text, which appears to grant some powers exclusively to Congress.²⁶¹ Thus, “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”²⁶² Furthermore, “[a]ll Bills for raising Revenue shall originate in the House of Representatives.”²⁶³ Congress, in other words, has the exclusive power to tax and spend, shared with the Executive only insofar as the President may sign or veto bills to tax and spend. In areas in which Congress has only concurrent

²⁵⁹ Of course, all treaties and international agreements bind the United States on the international plane, regardless of whether they are binding as a matter of domestic United States law. See Vienna Convention on the Law of Treaties, *supra* note 5, art. 27, 1155 U.N.T.S. at 339 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”). Put another way, it is possible for the United States to be bound on the international plane but not on the domestic (or “municipal”) plane. See generally LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 156–62 (1972) (describing the self-executing treaty doctrine).

²⁶⁰ See *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988) (holding that Congress may override treaties and other forms of international law, but must do so clearly).

²⁶¹ “There are certain grants of authority to Congress which are, by their very terms, exclusive. In these areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress.” *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978), *quoted in* Paust, *supra* note 6, at 779.

²⁶² U.S. CONST. art. I, § 9, cl. 7. “[T]he Constitution provides only one method—congressional enactment—for the appropriation of money.” *Edwards*, 580 F.2d at 1058.

²⁶³ U.S. CONST. art. I, § 7, cl. 1. This provision “appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes.” *Edwards*, 580 F.2d at 1058.

power, such as the power to regulate commerce with foreign nations, a treaty can and should operate as law without implementing legislation.²⁶⁴

It has been suggested that even the two provisions quoted above are not exclusive grants of power to Congress.²⁶⁵ "Just because all 'Bills' for raising revenue shall originate in the House, it does not follow that revenue may be raised in no other way."²⁶⁶ Indeed, self-executing treaties may affect tariffs, most-favored-nation status, and other laws that do raise revenue.²⁶⁷ But it is quite another thing to suggest that treaties can directly affect tax rates; until the Sixteenth Amendment was adopted in 1913, even Congress lacked the power to collect taxes without apportionment.²⁶⁸ In addition, it has been suggested that the requirement of "Appropriations made by Law" does not explicitly limit itself to *congressional* appropriations or to "Law" made only by Congress.²⁶⁹ This assertion must overcome the weight of two hundred years of practice. Early in our history, the House of Representatives clung to the position that it had the right to decide whether to appropriate funds to implement a treaty, rejecting the proposition that once a treaty called for appropriations, the Congress was legally bound to make the appropriation.²⁷⁰

²⁶⁴ See Paust, *supra* note 6, at 780 (asserting that implementing legislation should be required only where congressional power is exclusive); *Edwards*, 580 F.2d at 1057-58, *quoted in* Paust, *supra* note 6, at 778 (asserting that the foreign commerce power is not exclusive).

As Professor Paust points out, moreover, even an unimplemented non-self-executing treaty has some domestic legal effect, for it may have value as an interpretive tool. See Paust, *supra* note 6, at 781-82.

²⁶⁵ See *id.* at 780-81.

²⁶⁶ *Id.* at 780.

²⁶⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. i (1987).

²⁶⁸ See U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes . . . without apportionment among the several States.").

²⁶⁹ Paust, *supra* note 6, at 781.

²⁷⁰ See, e.g., 5 ANNALS OF CONGRESS 771 (1796), *quoted in* HENKIN, *supra* note 259, at 161-62 (resolving that the House had the right to approve or reject appropriations to implement the Jay Treaty); see also *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (C.C.D. Mich. 1852) (No. 14,251), *cited in* HENKIN, *supra* note 259, at 406 n.98.

It is also unlikely that a treaty establishing criminal penalties can be self-executing. It is settled constitutional law that there is no federal common law of crimes—that the Congress must enact a federal criminal code. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). The text of the Constitution seems to confirm that this rule applies to treaty-made crimes, as well. See U.S. CONST. art. I, § 8, cl. 10 (providing that Congress shall have the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). For more on this question, see the materials cited in HENKIN, *supra* note 259, at 406-07 n.99.

Nonetheless, much congressional power can and should be shared with the Executive.²⁷¹ We know that a treaty forbidding discrimination can be self-executing,²⁷² which implies that the congressional commerce power, or perhaps its power to enforce the Fourteenth Amendment, is not exclusive. The presumption should be that a treaty is self-executing unless its text or the Constitution requires otherwise—not the other way around, as is the case now. Such a presumption would come closer to the absolute command of the Supremacy Clause, and it would help restore Treaty to its rightful place as a significant source of law for the republic.

Assuming that some treaties must be non-self-executing, to what extent is the Congress morally or legally bound to enact implementing legislation to bring treaties into effect? The Framers were divided on this question. Alexander Hamilton thought that the House of Representatives has “no moral power to refuse the execution of a treaty which is not contrary to the Constitution,” and indeed “no *legal* power to refuse its execution because it is a law.”²⁷³ On the other hand, the early House of Representatives, including Representative James Madison, resolved that “it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect”²⁷⁴ As Professor Henkin suggests, Hamilton’s proposal for a legal duty to implement might be more efficient, but Madison’s view is more consistent with the Framers’ general preference for checks and balances.²⁷⁵ Still, there is much to be said for Hamilton’s suggestion that Congress has a moral duty to implement treaties, at least when the treaty has already received congressional blessing in the form of Senate advice and consent to ratification. The Supremacy Clause clearly contemplates that treaties would be the “supreme law of the land” upon Senate advice and consent. Perhaps Congress should be held politically accountable when it prevents this from happening.

In most cases, however, the Senate never gives its advice and consent to anything, since most international agreements of the United States are considered executive agreements rather than full-fledged treaties. In such

²⁷¹ See Paust, *supra* note 6, at 777 n.102; *Edwards v. Carter*, 580 F.2d 1057, 1057–58 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978).

²⁷² *Asakura v. Seattle*, 265 U.S. 332 (1924).

²⁷³ WORKS OF ALEXANDER HAMILTON 566 (J.C. Hamilton ed., 1851), *quoted in* HENKIN, *supra* note 259, at 161 (emphasis added).

²⁷⁴ 5 ANNALS OF CONGRESS 771 (1796), *quoted in* HENKIN, *supra* note 259, at 161–62. This debate revolved around implementation of the controversial Jay Treaty to regulate relations with Britain. The treaty passed the House by a narrow margin. See HENKIN, *supra* note 259, at 16–62.

²⁷⁵ See *id.* at 162.

instances, the case for careful congressional deliberation is much stronger, since the process of congressional implementation represents the only congressional input on the agreement. Of course, the Constitution does not distinguish between treaties and executive agreements, but from early on it has been United States practice to permit the Executive to negotiate some agreements without the Senate's advice and consent.²⁷⁶ These agreements stem from authority granted by Congress, or previous treaties, or even from the Executive's sole authority.²⁷⁷ This practice has practicality on its side; the Senate is not well-equipped to give advice and consent to the many international agreements concluded by the Executive.²⁷⁸

It is doubtless too late to suggest that this time-honored habit violates the Constitution. The inevitable consequence, however, has been a further devaluation of international agreements in United States law. Although it appears that executive agreements can be self-executing,²⁷⁹ many will still require implementing legislation. Indeed, there is bound to be greater political pressure for Congress to deliberate carefully over implementing legislation—in effect, to consider an agreement *de novo*—when the Senate has not passed on the agreement. Thus, the fate of the North American Free Trade Agreement²⁸⁰ (NAFTA) rested in the hands of both Houses of Congress, not the President “with the Advice and Consent of the Senate.”²⁸¹ It is as if the Articles of Confederation, under which the Congress directed the negotiation of treaties, had never been replaced by a federal constitution with explicit separation of the treaty powers. Perhaps we should drop the pretense that the Executive negotiates important international agreements like NAFTA, for without congressional implementing legislation they are doomed. Perhaps the President should first seek the necessary legislation, or at least some form of congressional authorization, before spending large amounts of time and money negotiating a controversial international agreement. Perhaps we should explicitly recognize that Legislation is all that matters, and that Treaty is, at long last, dead.

²⁷⁶ See *id.* at 173–84.

²⁷⁷ See *id.*

²⁷⁸ See *id.* at 173 (noting that executive agreements far outnumber full-fledged treaties).

²⁷⁹ See *United States v. Belmont*, 301 U.S. 324, 331 (1937).

²⁸⁰ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605.

²⁸¹ U.S. CONST. art. II, § 2, cl. 2.

C. Burial or Resurrection? The Americanization of International Law

The United States probably has more influence over international law than any other state in the world. More often than not, the United States is the leader in the Security Council.²⁸² It was, after all, the United States that led the Allied Coalition into the Gulf War, which contributed a slew of Council resolutions on everything from diplomatic relations to the use of force to the corpus of international law. The United States is certainly one of the most important delegations at most multilateral law-making conferences. The United Nations itself, which was negotiated on the American West Coast and is headquartered on the East Coast, was in part a product of the American imagination.

Even bilateral treaties of the United States sometimes influence the direction of international law. American bilaterals often reflect more experimentation than multilaterals to which the United States is party. The 1985 U.S.-U.K. supplemental extradition treaty²⁸³ is a case in point. That agreement restricted the scope of the traditional "political offense" exception to extradition, thereby making it more difficult for terrorists to avoid extradition.²⁸⁴ This provision was unprecedented in extradition law, and it laid the foundation for a stronger international response to terrorism. Other examples include the U.S.-China agreement prohibiting export of products made by prison labor,²⁸⁵ treaties for mutual legal assistance in criminal cases,²⁸⁶ and Bilateral Investment Treaties.²⁸⁷

Even unilateral United States practice has helped create new international law. Our Constitution is a model for the constitutions of newly independent

²⁸² "There is no question about the identity of P-1." Reisman, *supra* note 233, at 97. The term "P-5" or "Perm-5" refers to the Permanent Five members of the Security Council. *Id.*

²⁸³ Supplementary Treaty Concerning the Extradition Treaty, June 25, 1985, U.S.-U.K., 24 I.L.M. 1105.

²⁸⁴ *Id.* art. 1. At the same time, the parties relaxed the "rule of non-inquiry" that traditionally barred examination of the requesting state's legal system, thereby permitting fugitives to challenge extradition by pointing to human rights violations in the requesting state.

²⁸⁵ Memorandum of Understanding on Prohibiting Import and Export Trade in Prison Labor Products, Aug. 7, 1992, China-U.S., 31 I.L.M. 1071.

²⁸⁶ *See, e.g.*, Treaty Concerning The Grand Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. (1987).

²⁸⁷ *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, 21 I.L.M. 927.

states and even for multilateral human rights treaties.²⁸⁸ Indeed, the Clinton Administration pushes openly—as well it should—for universal norms of human rights that largely resemble those enshrined in our own Bill of Rights.²⁸⁹ The United Nations Sales Convention reflects the influence of our innovative Uniform Commercial Code.²⁹⁰ To be sure, other states have helped chart the course of international law, and no one state alone can create customary international law, which grows out of a “general and consistent practice” of states.²⁹¹ But no state has had as much influence for so long as the United States. International lawyers are accustomed to speaking of the “reception” of international law into domestic legal systems.²⁹² In our era, however, the process has reversed itself: the domestic law of the United States (and, less frequently, of other states) is now “received” into international law, at least on occasion.

Americanization also extends to the domestic law of foreign states. The United States Foreign Sovereign Immunities Act,²⁹³ which codifies important principles of international law, has generated a significant body of law on sovereign immunity, law that is bound to influence foreign tribunals and legislatures.²⁹⁴ Even our Constitution and Bill of Rights have influenced the

²⁸⁸ See Ronald St. J. MacDonald, Book Review, 86 AM. J. INT'L L. 192, 196 (1992) (noting that the U.S. Constitution has had “profound influence” on constitutionalism and human rights abroad).

²⁸⁹ See *Human Rights Are For All*, Christopher Tells Meeting, *supra* note 230, at A10.

²⁹⁰ See S. TREATY DOC. 9, 98th Cong., 1st Sess., at 22 (1983), reprinted in 19 I.L.M. 668 (reprinting Secretary of State Shultz's view that the Convention “embodies the substance of many of the important provisions of the U.C.C. and is generally consistent with its approach and methods”). *But cf.* Note, *Unification and Uncertainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1999 (1984) (arguing that the U.C.C. is not “substantially similar” to foreign commercial codes).

Of course, the Uniform Commercial Code and other sources of American law owe much to foreign sources. For an interesting discussion along these lines, see James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

²⁹¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

²⁹² See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 50–52 (4th ed. 1990) (describing the process of “reception” or “incorporation” of international law into municipal law). The self-executing treaty doctrine is one of many mechanisms designed to facilitate (or impede, as the case may be) the reception of international law into domestic law. See *supra* part II.B.

²⁹³ 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–11 (1992).

²⁹⁴ See, e.g., *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989); *cf.* Statute of the International Court of Justice, June 26, 1945, art. 38(d), 59 Stat.

development of foreign constitutions.²⁹⁵ These developments are one more step removed from the traditional concept of "reception" of international law: here, one country's domestic law is received into that of another.

In many ways these are welcome developments. Constitutionalism, American and otherwise, still has much to offer to a system of world government that is still in its infancy. Moreover, federal states like the United States have experience in codification and unification of law, as with the Uniform Commercial Code. In addition, this new process of reception offers more hope for a stable international order than any regime that depends on enforcement of treaties. If all states enacted human rights norms, including the rule of law, into positive law, human rights might be better enforced than they are now.

Obviously, however, the domination of international law by one state, however well-intentioned, could also be characterized as legal and moral imperialism. Some American practice is clearly unacceptable to the international community. Much debate on the permissible use of force centers on American military actions. In some cases, as in Iraq and Somalia, United States leadership has molded a new consensus about the acceptable limits of the use of force. In others, as in Vietnam, Grenada and Panama, United States military intervention has been more controversial and has created less certain precedents.²⁹⁶ This is also the case in law enforcement. On the one hand, American efforts to establish new methods of evidence-sharing have culminated in a wave of interest in Mutual Legal Assistance Treaties, which provide a streamlined alternative to letters rogatory.²⁹⁷ On the other hand, United States

1095, T.S. No. 993 (providing that the World Court shall apply "judicial decisions" as "subsidiary means for the determination of rules of law").

²⁹⁵ See MacDonald, *supra* note 288, at 196 (reviewing CONSTITUTIONALISM AND RIGHTS (Louis Henkin & Albert J. Rosenthal eds., 1990)) (noting that contributors to the book are in "unanimous" agreement that "the U.S. Constitution has had profound influence around the world").

Not all such influence has been positive. One commentator argues that *de jure* racial segregation in the United States helped justify apartheid in South Africa in the 1940s and 1950s. See John Dugard, *Toward Racial Justice in South Africa*, in CONSTITUTIONALISM AND RIGHTS, *supra*, at 367-68. Another commentator suggests that American notions of substantive due process have distorted foreign constitutionalism. See Anthony Ogus, *Property Rights and Freedom of Economic Activity*, in CONSTITUTIONALISM AND RIGHTS, *supra*, at 146.

²⁹⁶ See, e.g., LOUIS HENKIN, *supra* note 10, at 304-08 (describing conflicting views about the legality of the U.S. effort in Vietnam); Maechling, *Washington's Illegal Invasion*, FOREIGN POLICY, Summer 1990, at 113 (criticizing the invasion of Panama).

²⁹⁷ Letters rogatory, or letters of request, are the traditional means by which a court in one state seeks judicial assistance from a court in a foreign state. See, e.g., 28 U.S.C.

efforts to enforce criminal laws extraterritorially have met with furious resistance from abroad. Thus, the United States has earned mainly international scorn for kidnapping a fugitive from Mexico,²⁹⁸ seizing and imprisoning General Manuel Noriega for drug-related crimes committed while leader of Panama,²⁹⁹ and attempting to apply United States export laws to foreign-incorporated subsidiaries of United States corporations.³⁰⁰ Our closest allies often regard differences over extraterritoriality as the worst aspect of their relations with the United States.³⁰¹ Nonetheless, Congress and the Executive appear to have boundless enthusiasm for extraterritoriality, and the judicial branch is generally prepared to defer to it.

Until recently, most extraterritorial enactments, and thus most debate on extraterritoriality, focused on civil antitrust enforcement as well as criminal activity by and against Americans abroad, and even extraterritorial conduct not involving Americans at all. Congress has outlawed all manner of drug crimes

§ 1782 (1992) (authorizing U.S. courts to use letters rogatory). The requesting state may respond as a matter of comity, but it is not legally obliged to do so. *See* SENATE COMM. ON FOREIGN RELATIONS, LEGIS. ACTIVITIES REP., S. REP. NO. 30, 102d Cong., 1st Sess. 15 (1991) (describing the shortcomings of letters rogatory). The Mutual Legal Assistance Treaty (MLAT) by contrast, imposes a legal obligation on the requested state to comply, and it contemplates much quicker action. *See id.* at 15-17.

The U.S. government has concluded at least a dozen MLATs, most of which have now entered into force. For a list of U.S. MLATs, see Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 75 n.194 (1992).

²⁹⁸ *See* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

²⁹⁹ *See* United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

³⁰⁰ *See* CARTER & TRIMBLE, *supra* note 82, at 748-59 (collecting relevant materials).

What is most odd about U.S. extraterritorial practice is that the United States has traditionally shied away from the exercise of relatively uncontroversial forms of extraterritoriality such as nationality jurisdiction. *See generally* Watson, *supra* note 297 (arguing that Americans who commit serious crimes abroad occasionally go free because the United States lacks nationality-based jurisdiction to prosecute when the territorial state cannot or will not prosecute). Even the exercise of passive personality jurisdiction, only now tentatively embraced by the United States, would seem less controversial than, for example, the Mexican kidnapping. *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1 (1993) [hereinafter Watson, *Passive Personality*] (arguing that the United States should exercise jurisdiction on the basis of the victim's American nationality, but only if the other interested sovereigns decline to prosecute).

³⁰¹ *See, e.g.*, John Kennedy, *Rich Papers' Availability is Under Debate*, WASH. POST, Sept. 21, 1983, at F1 (reporting Swiss complaints about U.S. efforts to apply U.S. law in Switzerland).

committed abroad, as well as terrorism and other serious offenses.³⁰² Many commentators have criticized these laws as unwarranted intrusions on foreign sovereignty.³⁰³ I have elsewhere endorsed jurisdiction based on the nationality of either the victim or the offender, so long as local officials have the first opportunity to prosecute.³⁰⁴

Interestingly, however, the debate on extraterritoriality now extends to human rights. Recent developments in United States human rights law suggest that the Americanization of international law is proceeding apace. Because of the importance of these developments, they will be considered in some detail.

In 1992, Congress enacted the Torture Victim Protection Act (TVPA),³⁰⁵ establishing a civil cause of action for money damages against any individual who, under color of foreign law, subjects an individual to "torture" or "extrajudicial killing."³⁰⁶ Torture is defined broadly to include various forms of physical and mental coercion,³⁰⁷ and the statute applies regardless of where the acts occurred.³⁰⁸ The Act requires that plaintiffs exhaust "adequate and available remedies" where the conduct occurred, and it imposes a ten-year statute of limitations.³⁰⁹

³⁰² See generally INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (Ved P. Nanda & M. Cherif Bassiouni eds., 1987).

³⁰³ See, e.g., DIETER LANGE & GARY BORN, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 36-37 (1987) (contrasting U.S. efforts to assert jurisdiction based on "effects" in U.S. territory with those countries requiring a closer jurisdictional nexus).

³⁰⁴ See Watson, *Passive Personality*, *supra* note 300; Watson, *supra* note 297, at 70-83.

³⁰⁵ Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) [hereinafter TVPA].

³⁰⁶ *Id.* § 2(a).

³⁰⁷ See *id.* § 3(b).

³⁰⁸ The text of the statute clearly implies that it is designed to have extraterritorial effect. It provides a cause of action only against individuals who act under authority or color of law of a "foreign nation." *Id.* § 2(a). Such conduct might occasionally take place within the United States, as when a foreigner assassinates a foreign national within the United States. See *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) (murder of former Chilean Ambassador in Washington, D.C.). Ordinarily one would expect most foreign-sponsored torture to take place on foreign soil. In addition, the TVPA speaks of exhaustion of remedies "in the place" in which the conduct occurred. *Id.* § 2(b). Moreover, the legislative history of the statute repeatedly indicates that it is intended to apply extraterritorially. See, e.g., S. REP. NO. 249, 102d Cong., 1st Sess. 5 (1991) (noting that TVPA would provide a remedy for those "tortured abroad."). Thus, the logic and legislative history of the statute plainly override the presumption that statutes do not have extraterritorial effect. See *The Over the Top*, 5 F.2d 838 (D. Conn. 1925).

³⁰⁹ TVPA, *supra* note 305, § 2(b)-(c).

The Act broadens the Alien Tort Claims Statute, a part of the Judiciary Act of 1789 that provides that "[t]he district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³¹⁰ The Alien Tort Statute lay dormant until 1980, when the Second Circuit held in *Filartiga v. Pena-Irala*³¹¹ that the statute permitted a Paraguayan national to sue another Paraguayan in United States district court for torture committed in Paraguay, even though the conduct took place entirely outside the United States. *Filartiga* is still good law today, but some authorities have questioned its rationale, arguing that the Alien Tort Statute did not explicitly create a private cause of action and calling on Congress to clarify the matter.³¹² The TVPA is designed to do just that. It now ensures that any plaintiff, not just an "alien," may bring suit in the United States for the most serious torts committed abroad—torture and extrajudicial killing.

As interpreted by *Filartiga*, the Alien Tort Statute is a classic example of the "moral imperialism" so readily denounced by the cultural relativists.³¹³ True enough, *Filartiga* represents Americanization of international law, for it

³¹⁰ Judiciary Act of 1789, 28 U.S.C. § 1350 (1992). The rather cryptic wording of the Alien Tort Statute raises many interesting questions. Why does the statute provide a civil action for aliens but not for U.S. citizens? Why did it fall into desuetude for two centuries? For a useful study of these and other issues, see generally Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

³¹¹ 630 F.2d 876, 885 (2d Cir. 1980).

³¹² See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Bork, J., concurring). Others have argued that the Statute does create a cause of action, but only against the United States or its officers—that it was designed to provide foreign nationals (or perhaps just foreign ambassadors) a federal remedy for torts committed by Americans against foreign nationals in order to protect them from denial of justice in state courts. See *id.* at 783 (Edwards, J., concurring); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489–98 (1986); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988).

³¹³ See, e.g., CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. I, ch. 3, ¶¶ 12–14 (Thomas Nugent trans., 6th ed. 1756) (endorsing relativism), cited in Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 743 (1992). The tension between relativism and universalism has generated an avalanche of writing. See, e.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 107–60 (1989); Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345 (1991); Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159 (Austin Sarat & Thomas R. Kearns eds., 1991); P. Schmidt, *Some Criticisms of Cultural Relativism*, 52 J. PHIL. 780, 788 (1955).

provides a new, American remedy for a violation of international law and in the process also helps define the substantive rights at stake.³¹⁴ For those who incline toward universal norms of human rights, this result is not altogether unwelcome. The Alien Tort Statute merely enforces treaties and customary law already in force; if a foreign state wishes to avoid its effect, that state can renounce the relevant treaties and international law defining human rights. In any event, the opponents of *Filartiga* have little to fear. Decisions following *Filartiga* are bound to be infrequent because the defendant (and the defendant's assets) will seldom be present in the United States.

Unlike the Alien Tort Statute, the TVPA was supposedly designed to "carry out the intent"³¹⁵ of a treaty—the recently-ratified Torture Convention.³¹⁶ The legislative history of the statute notes that the Torture Convention obliges state parties to ensure that torturers are "held legally accountable" for their acts.³¹⁷ The framers of the statute thus sought to cloak it in the legitimizing mantle of a treaty. According to Congress, the TVPA is not an effort to Americanize international law unilaterally; it merely implements a treaty adopted by a democratic gathering of states.

The truth, naturally, is not so simple. The Torture Convention does oblige parties to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation" ³¹⁸ But as the Bush Administration pointed out in hearings on the TVPA, the negotiating history of the Convention suggests that this provision was intended to provide a cause of action for torture within the territory of state parties, not torture on foreign soil.³¹⁹ The Administration explained that the Torture Convention supposedly included an "express reference to that effect" that was "deleted, evidently, by a mistake in the printed version."³²⁰ The Administration contended that adoption of the TVPA might be perceived by other countries as "inconsistent with the convention and overreaching on our part."³²¹ It argued instead that the United States should

³¹⁴ See also *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (applying the Alien Tort Statute to tort claims for disappearance and cruel and inhuman treatment).

³¹⁵ S. REP. NO. 249, 102d Cong., 1st Sess. 3 (1991).

³¹⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, *modified*, 24 I.L.M. 535 [hereinafter Torture Convention].

³¹⁷ S. REP. NO. 249, 102d Cong., 1st Sess. 3 (1991).

³¹⁸ Torture Convention, *supra* note 316, art. 14(1).

³¹⁹ See *Torture Victim Protection Act of 1989: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Sen. Comm. on the Judiciary*, 101st Cong., 2d Sess. 19 (1990) (testimony of David P. Stewart, Ass't Legal Adviser, U.S. Dep't of State).

³²⁰ *Id.*

³²¹ *Id.* at 20.

focus on ratifying and implementing the actual terms of the Torture Convention, which oblige states to extradite or prosecute alleged torturers.³²²

The Senators present at the TVPA hearings did not share the Administration's concern that the statute exceeded the limits of the Torture Convention. Senator Simon first pointed out that some states inevitably would not ratify or implement the Torture Convention, implying that the TVPA could fill this gap.³²³ The Administration responded by noting that the TVPA would not fill the gap because it would usually result in an "empty judgment."³²⁴ Like Senator Simon, Senator Specter saw the TVPA as a useful complement to the Torture Convention. Senator Specter noted that the Torture Convention already contemplated enactment of an extraterritorial criminal statute by state parties, and he asked why enactment of an extraterritorial civil statute would be inconsistent with the Convention. The Justice Department spokesman replied that with a criminal statute the executive branch would have control over whether to prosecute, whereas a civil statute would put sensitive foreign policy matters in the hands of private individuals.³²⁵ Senator Specter acknowledged this explanation, but he went on to shepherd the bill through the Senate.³²⁶ The Act passed Congress with overwhelming bipartisan support, which was apparently enough to persuade the Administration to drop its opposition. On March 16, 1992, President Bush grudgingly signed the bill into law. His signing statement, which reiterates the Administration's arguments against the bill, reads more like an explanation of a veto.³²⁷

This curious legislative history reflects the peculiar balance of federal power over foreign relations. When political actors in the United States wish to shape international law, the competing branches of government understandably

³²² See *id.* at 9 (testimony of John O. McGinnis, Deputy Ass't Att'y Gen., U.S. Dep't of Justice) (arguing for the "multilateral" approach embodied in the treaty).

³²³ *Id.* at 31 (remarks of Sen. Simon).

³²⁴ *Id.* at 35 (testimony of Mr. Stewart).

³²⁵ *Id.* at 34 (remarks of Sen. Specter and testimony of Mr. McGinnis).

³²⁶ See, e.g., 138 CONG. REC. S2667-69 (daily ed. Mar. 3, 1992) (statement of Sen. Specter) (arguing for enactment of the TVPA and expressing his acknowledgement of the explanation with a polite "OK. Thank you very much.").

³²⁷ The statement warns of "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery." Such abuse would cause "serious frictions" in U.S. foreign relations and would also waste U.S. judicial resources. "[T]here is too much litigation at present even by Americans against Americans," much less by aliens against aliens. Nonetheless, "[W]e must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." Statement by President George Bush Upon Signing H.R. 2092, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 16, 1992).

use the tools over which they have the most authority. The President treats; Congress legislates. Thus, in the debate over the TVPA, the President saw implementation of our treaty obligations as the first priority, whereas Congress was more interested in fashioning a new remedy not found in the Torture Convention. Paradoxically, the implied limitation on extraterritorial civil suits in the multilateral Convention—the most “democratic” form of international law—meant more to the Administration than to the more “democratic” (with a small “d”) Congress, which sought to create a remedy rejected by the framers of the Convention. The paradox is compounded by the political identity of the actors involved: the same Republican President who invaded Panama to execute a search warrant³²⁸ opposed the TVPA because of inconsistencies with international law, just as the same Congress that trumpets the virtues of international law³²⁹ was more interested in expanding on the Torture Convention than ratifying or implementing it.³³⁰

Perhaps much of this paradox can be explained by the underlying substantive issue: A Republican President is likely to oppose measures that impose greater burdens on the courts, just as a Democratic (with a large “d”) Congress is likely to tolerate such burdens in exchange for broader vindication of individual rights. Under this view, one invokes international law when it serves one’s real agenda. In other words, to misquote Senator Moynihan, “real men *do* cite Grotius”—when it is in their interests to do so.³³¹ But this view does not explain why the TVPA enjoyed so much Republican support in Congress. In fact, few members of Congress, Democrat or Republican, were convinced that the TVPA would add much to the workload of the courts, since so few defendants would be available for suit. The TVPA does not repeal the Due Process Clause.

Perhaps Republicans in Congress more readily supported the TVPA than the Republican President because they sought to make their own mark on foreign policy and international law, independent of treaties and other foreign

³²⁸ See Warren Richey, *Noriega’s Ouster Carries Hefty Price Tag*, CHI. TRIB., Sept. 8, 1991, § 1, at 27 (quoting Professor Baldwin’s description of the capture of Noriega as “the most expensive execution of a search warrant ever”).

³²⁹ See, e.g., 139 CONG. REC. S5767–68 (daily ed. May 11, 1993) (statement of Sen. Specter) (condemning Iraqi violations of international law); 137 CONG. REC. S987–88 (daily ed. Jan. 17, 1991) (statement of Sen. Moynihan) (urging President Bush to adhere to international law).

³³⁰ Two years after the enactment of the TVPA, the Torture Convention was finally implemented by Congress. See Foreign Relations Authorization Act, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified as amended at 18 U.S.C. §§ 2340, 2340A).

³³¹ See DANIEL P. MOYNIHAN, ON THE LAW OF NATIONS 7 (1990) (“[I]n the 1980s [international law] had come to be associated with weakness in foreign policy. Real men did not cite Grotius.”).

policy initiatives of the President. Unless it makes legislation, Congress plays an essentially passive role in the making of foreign policy. The President, by contrast, conducts diplomacy, deploys United States military personnel, appoints and receives ambassadors, and makes and abrogates treaties and alliances. Even the Senate's power to approve treaties is a passive power that is exercised only over a tiny minority of international agreements. And even that power is limited: though the Senate has grown more adept at attaching reservations and the like to treaties, in the end it still must simply vote yea or nay. As Professor Koh says, the President almost always "wins" in foreign affairs.³³² On occasion, however, Congress can win by passing legislation. Legislation can implement or override treaty obligations, and even (as in the case of the TVPA) contribute to the development of new international law. Innovative legislation like the TVPA allows members of Congress to tell their constituents that they initiated a change in foreign policy, not just that they followed the President's lead.

Thus, Congress may well have an institutional incentive to act independently of the treaty process, and perhaps even to marginalize the treaty process. This incentive has grown stronger in the past thirty years as foreign policy debacles like Vietnam and scandals like Watergate have diminished public confidence in the executive branch. Indeed, during that period Congress has taken an unprecedented interest in foreign policy. Congress has created and often initiated much of the law that has Americanized international law, in particular, the extensive network of extraterritorial statutes on narcotics and terrorism. More generally, Congress has established legislative guidelines on virtually all aspects of foreign policy, from the war powers and national security to immigration, terrorism, narcotics, human rights, and nuclear nonproliferation. What was once a handful of laws is now collected in a multivolume set entitled *Legislation on Foreign Relations*.³³³

By the same token, Congress has an institutional interest in preserving the doctrine of self-executing treaties, which ensures that both Houses of Congress will have an opportunity to implement a treaty before it becomes law. Many Presidents would undoubtedly love to have the power to change United States domestic law solely by treaty, and many members of Congress would no doubt balk at such a regime.

None of this is to suggest that Congress has gone too far. On the contrary, Congress has made the executive branch a more alert and thorough custodian of foreign policy. The congressional requirement of annual reports on matters

³³² See generally Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

³³³ U.S. CONGRESS, COMM. ON FOREIGN AFF. & COMM. ON FOREIGN RELATIONS, *LEGISLATION ON FOREIGN RELATIONS* (1992).

like human rights and narcotics, for example, forces the Department of State to factor those matters into its foreign policymaking. At the State Department, grumbling about the human rights reports has diminished with time.³³⁴ In my view, the annual human rights report has evolved into a useful tool of the Executive's foreign policy. Moreover, when Congress has "pushed the envelope" and legislated "unilaterally" for the United States—that is, independently of treaty obligations—it has often created useful innovations that may some day inspire enough imitations abroad to crystallize into customary international law. The TVPA is an illustration; the antiterrorism and antinarcotics laws are others.

My only purpose here is to suggest that legislative innovation is in tension with stable treaty relations, since unilateral legislation will often produce different results than multilateral negotiation. A Congress that wishes to make its mark must do something different than the President, and that means doing something other than what is contained in existing or contemplated treaty obligations. This action, in turn, means that the United States will continue to establish new unilateral customs that may or may not crystallize into general and consistent practice around the world. Thus, the "congressification" of American foreign policy may hasten the death of Treaty, and, at the same time, Americanize international law.

There is much to be said for the congressification of international law. It encourages innovation in the international system, and, like the Security Council, it moves more quickly than the cumbersome treaty process. Already the TVPA has prompted a class action lawsuit charging the Bosnian Serb leader Radovan Karadzic with responsibility for mass rape and other atrocities committed in the Balkan conflict.³³⁵ Meanwhile, the Security Council's new war crimes tribunal, though established in record time, is still not operating.³³⁶ Nonetheless, unilateral congressional action—like unilateral action by states or even hasty action by the Security Council—often suffers because it lacks input from other states, whose cooperation may be essential to the success of a particular legislative initiative. Would not the TVPA be more effective if it were coupled with a multilateral agreement to enforce judgments against

³³⁴ See Kim C. Williamson, Counting the Pain: The U.S. Country Reports on Human Rights Practices 8, 16 (Spring 1993) (unpublished manuscript, on file with author) (noting that foreign service officers initially took a dim view of the reporting requirement, but that much skepticism has now dissipated).

³³⁵ *Jane Doe v. Karadzic*, No. 93-Civ.-878 (S.D.N.Y. filed Feb. 11, 1993). See Paul Lewis, *Immunity Sought for Bosnian Serb*, N.Y. TIMES, Feb. 23, 1993, at A8 (reporting on Karadzic's efforts to obtain immunity from the suit while visiting the United States for peace talks).

³³⁶ See *Foot-Dragging on War Crimes*, N.Y. TIMES, Aug. 5, 1993, at A20.

torturers?³³⁷ Perhaps the TVPA will inspire such an agreement. If so, it will be an unmitigated success; if not, it will surely be better than nothing.

There certainly is room for legislation that stretches the boundaries of international law. Congress should bear in mind, however, that it has a more fundamental responsibility to ensure that *existing* international law is given effect. The Senate should give higher priority to its duty to advise and consent to the ratification of treaties. Once ratified, treaties often require implementing legislation because the self-executing treaty doctrine ensures that many ratified treaties are a dead letter as a matter of domestic law. For example, while Congress has stretched the limits of the Torture Convention by enacting the TVPA, Congress has still not gotten around to the more basic task of enacting legislation to carry out the central provisions of the Torture Convention relating to the criminalization of torture and the extradition of torturers. The Torture Convention is only one case in point. The 102d Congress had a better-than-average record in approving treaties, but many important treaties on subjects ranging from human rights to environmental law still await ratification.³³⁸

In sum, Congress may be able to diminish the importance of treaties by legislating unilaterally. In some areas, like crime, such development would be unfortunate, in others, like human rights, it may be tolerable or even salutary. The greater danger, however, is that Congress will do nothing to approve or implement agreements—that it will allow treaties to wither and die of neglect.

³³⁷ Indeed, the Security Council considered and rejected a proposal to empower the new war crimes tribunal with broad authority to order compensation for victims of war crimes. *See* RAPPORTEURS UNDER THE CSCE MOSCOW HUMAN DIMENSION MECHANISM TO BOSNIA-HERZEGOVINA AND CROATIA, PROPOSAL FOR AN INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA 113 (1993) (draft Article 33 of court statute) (proposing a right to restitution as well as “appropriate compensation”). The final version of the tribunal’s statute appears to authorize restitution only, without any other compensation. *See* Report of the Secretary-General, *supra* note 237, at 29 (Article 24(3) of statute).

The accompanying Security Council resolution appears to confirm that the tribunal will not concern itself directly with compensation other than restitution; it holds that the tribunal should work “without prejudice to the right of the victims” to seek compensation “through appropriate means.” S.C. Res. 827, *supra* note 91, at 2.

³³⁸ *See* S. REP. NO. 35, 103d Cong., 1st Sess., pt. 1 (1993) (reporting that during the 102d Congress, the full Senate approved only 49 of 89 pending treaties and that important human rights instruments still await action).

IV. CONCLUSION AND SPECULATIONS

Speaking descriptively, we might say that Treaty is being absorbed into Legislation.³³⁹ On the domestic plane, treaty law is not received into United States law unless Congress blesses it and executes it with implementing legislation. As we have seen, Congress seems increasingly overwhelmed by this responsibility. Even if a treaty is ratified and implemented, it still has only the status of a piece of legislation, and it can be repealed or modified by a subsequent Congress at any time.³⁴⁰ On the international plane, treaty law is of decreasing importance to our system of collective security, which has replaced the nineteenth century's network of bilateral treaties with the legislative pronouncements of the Security Council. The Council now carries out tasks traditionally assigned to treaties, such as the defense of states like Kuwait and the establishment of a war crimes tribunal for Yugoslavia, and occasionally it even alters existing treaty relations to achieve its goals. Outside of security matters, treatymaking is still alive and well. In this century, however, it has become a much more multilateral enterprise, and multilateral conferences resemble nothing more than legislative sessions.

The doctrinal plane suggests a slightly different trend. From a doctrinal standpoint, Treaty is slowly being reabsorbed into an international law version of Tort. Unilateral promises and promissory estoppel now compete with agreement, as alternative sources of liability. As with the doctrine of consideration, however, the doctrine of *pacta sunt servanda* remains the rule; upstarts like "international promissory estoppel" remain the exception. For now, the doctrinal decline of Treaty is less pronounced than its institutional decline.

In many respects, the decline of Treaty and the rise of Legislation is a "Good Thing."³⁴¹ It reflects a growing democratization of international law, a sense that ordinary people and small states have as much interest in its development as powerful politicians and superpowers. On the domestic plane, the congressification of foreign policy has led to increased attention to those aspects of international law affecting individuals—human rights, torture, narcotics, terrorism, and immigration, to name a few. There was a time when

³³⁹ Cf. GILMORE, *supra* note 1, at 87 ("Speaking descriptively, we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.'").

³⁴⁰ See *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

³⁴¹ See WALTER C. SELLAR, 1066 AND ALL THAT (1975) (dividing all of English history into "Good Things" and "Bad Things"). For more analysis along these lines, see E.O. PARROTT & W.F.N. WATSON, *THE DOGSBODY PAPERS, OR, 1066 AND ALL THIS* (1988).

some of these subjects—in particular human rights—were not thought to be fit subjects for international law, and thus not relevant to foreign policy.³⁴² On the international plane, increased reliance on the Security Council may favor the powerful Permanent Five members of the Council, but it also gives a significant say to the smaller states that outnumber the Perm-5 on the Council and therefore wield a “nonaligned” veto.³⁴³

While the legislative model of international law has its strengths, it also has its weaknesses. Legislatures are slow and inefficient. In domestic politics, a legislative model means a more democratic model, since more actors are involved in the decisionmaking process. Inevitably, though, a more democratic foreign policy also means a more cumbersome foreign policy. Oftentimes congressional delay will frustrate the development of international law in United States law, while at other times congressional adventurism will complicate the task of the Executive. On occasion, the United States will speak with different voices, thereby diluting or even obscuring American intentions and American influence abroad. In international politics, a more legislative system in some ways means a *less* democratic system of international relations, since the direct democracy of treaty negotiations is replaced by the representative democracy of the United Nations Security Council. This “republic” operates more quickly than the traditional “democracy” of the multilateral conference, but it also excludes participation by the vast majority of states, thereby enhancing the risk of noncompliance.

On balance, the advantages of the legislative model nonetheless outweigh the disadvantages. A less efficient American foreign policy is also a more stable one. The cumbersome multilateral conference and the more efficient but less representative Security Council help ensure that as many states as possible contribute to international law, thus preserving its legitimacy.

In any event, it appears that the legislative model is here to stay. Domestically, Congress is not about to give up its relatively new influence over foreign relations law. There may be partisan differences about the extent to which Congress should “micromanage” foreign policy, but there is bipartisan consensus that Congress should do more than just react to executive branch initiatives. Internationally, it seems unlikely that global security will again be governed exclusively by a web of bilateral alliances or that law-making multilateral conferences will wither away. The future of the Security Council is less certain, for it depends on internal developments in Russia and China. For

³⁴² For descriptions of this view, see Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L. J. 61 (1984); Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982) (tracing evolution of human rights law).

³⁴³ See Reisman, *supra* note 233, at 84.

now, all indications are that the United Nations intends to strengthen itself.³⁴⁴ Even in the absence of a strong Security Council, however, states would continue to organize themselves into regional alliances and economic zones like NATO and the European Community, for such confederations provide both military and economic advantages.

Twenty years ago, Professor Gilmore observed that law, like literature and art, oscillates between classical and romantic phases. In relatively dull classical times, all is "neat, tidy and logical," and formal rules of structure dominate the field.³⁴⁵ Eventually the classical sensibility "breaks down in a protracted romantic agony," during which romantics innovate, improvise, and "deny the existence of any rules," resulting in a more interesting mix of confusion, chaos, and unlimited self-expression.³⁴⁶ This phase, too, subsides, and classical forms again reassert themselves by imposing order on the wilderness. According to Professor Gilmore, the nineteenth century was the classical era of contract law, the height of doctrinal formalism, and the twentieth century has been the romantic backlash, the era of promissory estoppel and public policy doctrine.

Much the same can be said about international law. The classical era of international law reached its height in nineteenth century Europe, when an interlocking jigsaw puzzle of bilateral treaties defined international relations. Foreign policy was driven by the distribution of military and economic power, not by idealistic notions of the sovereign equality of states, world government, or human rights. This period stressed the sanctity of treaty obligations and rejected formless exceptions like the doctrine of *rebus sic stantibus* (changed circumstances).³⁴⁷ The United States adhered to the notion that the chief executive was the "sole organ" in foreign policy, and that the only role of Congress was to ensure that the President's treaties were properly ratified and executed.³⁴⁸ International politics was a game played by the few, not the

³⁴⁴ See, e.g., BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE (1992) (calling on states to supply troops for a standing U.N. force); cf. Steven A. Holmes, *Clinton May Let U.S. Troops Serve Under U.N. Chiefs*, N.Y. TIMES, Aug. 18, 1993, at A1.

³⁴⁵ GILMORE, *supra* note 1, at 102.

³⁴⁶ *Id.*

³⁴⁷ See The London Declaration, Jan. 17, 1871, reprinted in Bederman, *supra* note 65, at 3 (declaring that states must abide by treaties without exception).

³⁴⁸ See, e.g., *In re Thomas Kaine*, 55 U.S. 103, 138 (1852); *United States v. Smith*, 27 F. Cas. 1233, 1235 (C.C.N.Y. 1806) (No. 16,342A); *United States v. Robins*, 27 F. Cas. 825, 867 (C.C.D.S.C. 1799) (No. 16,175). John Marshall helped popularize the phrase in a speech before the House of Representatives. "The President is the sole organ of the nation in its external relations . . ." 2 ANNALS OF CONG. 466 (1800).

The phrase has continued to turn up in twentieth century decisions. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936), quoted in *United States v. Pink*, 315 U.S. 203, 229 (1942). *Curtiss-Wright* has been criticized but never overruled, and it

many—by powerful states and a few of their most powerful leaders, not by small states and their legislatures. Diplomacy was a highly personal business carried out between individuals instead of bureaucracies, and it produced a concrete result in the form of a treaty. Nineteenth century treaties often had the character of personal contracts between individual leaders.

The twentieth century has been a romantic era of international law. It began with Woodrow Wilson and others who dreamed of a new multipolar world in which war was illegal and disputes were settled in a peaceful forum like the League of Nations. International relations was no longer just a *process*, a perpetual balancing of power relations; it had a *substantive* goal, the promotion of democracy and even human rights. The disaster of World War II killed the League of Nations, but it did not destroy Wilsonian idealism. Instead of giving up in despair, the idealists tried again by inventing a United Nations explicitly dedicated to goals that nineteenth century realists would have mocked as unrealistic and even offensive to state sovereignty. The United Nations Charter sought no less than to “save succeeding generations from the scourge of war” and to affirm “the dignity and worth of the human person” and to promote “social progress and better standards of life.”³⁴⁹ Our most prominent jurists wrote unapologetically of the need for effective world government.³⁵⁰ The idealism continues today. Multilateral conferences hammer out international legislation on such diverse subjects as the environment, human rights, trade, whaling, fisheries, copyright law, cultural property, and judicial assistance. International agreements now bear the fingerprints of thousands of bureaucrats from countries big and small, not just the signature of two prominent politicians. Among scholars of international law, meanwhile, there is hopeful talk of “human rights” for whales³⁵¹ and a power of judicial review for the World Court.³⁵² We like to speak as if international law matters.

continues to support the proposition that sovereignty is a source of the federal foreign affairs power quite apart from any specific grant of power in the Constitution. See HENKIN, *supra* note 259, at 23–26. But its insistence that the President is the “sole” foreign policy “organ” is difficult to square with modern foreign relations law in which the Congress and even the judiciary play at least some role. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 105–13 (1989).

³⁴⁹ U.N. CHARTER pmbl., ¶ 1.

³⁵⁰ See, e.g., PHILIP JESSUP, *A MODERN LAW OF NATIONS* 2 (1948) (“Until the world achieves some form of international government in which a collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled.”).

³⁵¹ See Anthony D’Amato and Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21, 27 (1991) (“We believe that the phrase ‘human rights’ is only superficially species chauvinistic. In a profound sense, whales and some other sentient

Perhaps a new era of classicism awaits in the wings. Realists have long warned against excessive romanticism about the prospects for world government.³⁵³ And sure enough, the romantic euphoria of the immediate post-Cold War era has already dissipated. Visions of a U.S.-Russian partnership are now clouded by the rise of Russian nationalism. Dreams of a harmonious and effective Security Council have been replaced by television pictures of the demise of Bosnia and Herzegovina. Hopes for political and monetary union in Europe have given way to the reality of differing sovereign interests.³⁵⁴ The "new world order" increasingly resembles the old world order of the nineteenth century—a jumbled, fractured, decentralized community of many competing states.³⁵⁵

If states continue to break up into many smaller states, and if Russia or China stop cooperating with the West in the Security Council, then multilateral forms of international relations and law-making will naturally become more unwieldy, and diplomacy may revert to more traditional forms. International law may move away from legislative models of law-making like Security Council resolutions and toward contract models like bilateral treaties. Treaty, like Contract, is dead—"but who knows what unlikely resurrection the Easter-tide may bring?"³⁵⁶

mammals are entitled to human rights, or at least to humanist rights") (footnote omitted). I do not mean to mock this view, for in essence I share it; I merely suggest that it reflects the idealism of our day.

For more on the propriety of the term "human" rights, see PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* 223-58 (1975). Cf. *STAR TREK VI: THE UNDISCOVERED COUNTRY* (Paramount Pictures 1992) (providing a Klingon view of the term "human rights").

³⁵² See Watson, *supra* note 200, at 28-45.

³⁵³ See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 94 (1993) (deriding "incurable judicial romantics who look to courts as a type of *deus ex machina*").

³⁵⁴ See *A Survey of the European Community: A Rude Awakening—The Shame of It*, THE ECONOMIST, July 3, 1993, at 16-17 (describing dim prospects for a European union).

³⁵⁵ But cf. Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFF., Mar./Apr. 1994, at 28, 32-41 (criticizing the notion that states "compete" in any meaningful sense).

³⁵⁶ GILMORE, *supra* note 1, at 103.

